92-2025

No.

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN DOE,

*Petitioner,*

v.

JAMES R. WOOLSEY,
DIRECTOR OF CENTRAL INTELLIGENCE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether an employee of the Central Intelligence Agency has a constitutionally protected expectation of continued employment with the Agency such that his employment cannot be terminated without notice of the charges against him and an opportunity to respond.

2. Whether a homosexual employee of the CIA who comes forward with evidence that his employment with the Agency was terminated pursuant to a policy barring the employment of known homosexuals states a colorable equal protection claim.

3. Whether, assuming that a homosexual employee of the CIA is terminated based on consideration of the facts of his particular case, a colorable constitutional claim is stated where it is alleged that the Agency views the security significance of conduct engaged in by homosexuals differently from conduct engaged in by heterosexuals.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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John Doe, a homosexual employee of the Central Intelligence Agency ("CIA"),[1/] petitions the Court for a writ of certiorari to review the judgment rendered in this case by

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[1/] Throughout this litigation petitioner has proceeded under the pseudonym "John Doe" because his status as a covert CIA employee cannot publicly be revealed and not because of any embarrassment concerning his homosexuality.

the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 8a-26a) is reported at 981 F.2d 1316. The opinion of the district court (App. 28a-47a) is reported at 769 F. Supp. 1.

## JURISDICTION

The opinion of the court of appeals was filed on January 12, 1993. Doe filed a timely petition for rehearing and suggestion for rehearing *en banc* on February 26, 1993, which were denied in orders filed March 23, 1993 (App. 2a-7a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (Supp. 1993).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amendment V, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c) (1991), provides as follows:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the Director of the Office of Personnel Management.

## STATEMENT

### A. The Underlying Facts[2/]

John Doe began his employment with the CIA in June 1973 as a clerk-typist. Pursuant to CIA regulations in effect at that time, he was employed on a probationary basis during his first year with the Agency. When he began his employment, Doe was told by Agency officials that after the completion of the probationary period he would continue to be employed so long as his services were needed and he did his work well, complied with security regulations, and protected classified information from unauthorized disclosure.

Doe successfully completed his probationary period in 1974 and performed clerical duties through 1977. In November 1977, he assumed a more responsible position as an electronics technician. In 1978, he was selected for the CIA's upward mobility program which provided him with advanced training in his technical field. From June 1980 until his termination in May 1982, Doe was assigned to duties which required that his status as a CIA employee not be

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[2/] This statement of underlying facts is based on the statements set forth in earlier opinions of the district court, the court of appeals and this Court in this case. *Webster v. Doe*, 486 U.S. 592, 594 (1988); *Doe v. Casey*, 796 F.2d 1508, 1512 (D.C. Cir. 1986); *Doe v. Casey*, 601 F. Supp. 581, 583 (D.D.C. 1985).

publicly acknowledged. His work with the CIA was exemplary in all respects, and his periodic fitness reports consistently rated him as a strong or outstanding employee.

Doe was aware of his homosexuality and engaged in homosexual activities starting in 1976. He is not embarrassed or ashamed about his homosexuality, and his family and friends and some of his neighbors are aware of his sexual orientation. Consequently, plaintiff's homosexuality does not render him susceptible to blackmail or other pressures. Furthermore, as confirmed by a CIA polygraph examination, Doe never disclosed classified information to any unauthorized person, including his homosexual partners, and did not engage in sexual relationships with foreign nationals. Doe never made advances toward fellow CIA employees, and his homosexuality in no way disrupted his working relationships with colleagues there.

On January 28, 1982, Doe voluntarily informed a CIA security officer of his sexual orientation. Although Doe suspected that the CIA would not approve of his homosexuality, none of the lectures he received or materials he read on security matters during his eight and a half years with the Agency defined homosexuality to be prohibited conduct. Indeed, the materials provided to him by the Agency indicated that he was under no restrictions in his private life beyond those applicable to other federal employees. Nevertheless, following Doe's voluntary disclosure of his homosexuality, two different CIA security officials told him that his homosexual activities violated CIA regulations. Those admissions notwithstanding, the Deputy General Counsel of the CIA later informed Doe's attorney that while homosexuality was considered a security concern, it was not a *per se* ground for dismissal. Instead, according to the Deputy General Counsel, the Agency considered homosexuality on a case-by-case basis.

On February 2, 1982, Doe was informed that he was being placed on administrative leave. While on administrative leave, Doe did not have to report for work but continued to receive his salary. This arrangement remained in effect until May 7, 1982, the effective date of Doe's termination.

On February 12 and 17, 1982, Doe was interviewed by a CIA polygraph officer who questioned him at length about his homosexuality and possible security violations. At the end of each session, the officer administered a polygraph test consisting of specific questions. At the end of the second session, the officer told Doe that the polygraph indicated he had truthfully answered all the questions put to him, including the statements that he had not disclosed classified information to his homosexual partners and had not had sexual relations with foreign nationals.

On March 23, 1982, Doe was permitted to review a five page factual report prepared by the polygraph officer on the basis of his interviews with Doe, and at that time Doe prepared a two page addendum to the report. During the meeting, security officers told Doe that an "adjudication" of his case would be prepared on the basis of the factual report and that both documents would be forwarded to the Director of Security.

On April 14, 1982, a security officer informed Doe that the Office of Security had determined that "the circumstances of his homosexuality" posed a security threat. The security officer also requested that Doe resign from the CIA. After Doe refused to resign, the security officer said that the Office of Security would recommend to the Director of Central Intelligence ("DCI" or "Director") that Doe's employment be terminated. On April 20, 1982, Doe's counsel hand-delivered a letter requesting the DCI to overrule the recommendation to terminate Doe, or, in the alternative, provide him with the opportunity to learn of and respond to the charges against him. The CIA made no response to this request.

On May 12, 1982, a security officer informed Doe that the DCI had terminated Doe's employment with the Agency, effective May 7, 1982. On May 11, 1982, the Deputy General Counsel for the CIA wrote to Doe's counsel informing him that the DCI had "deemed it necessary and advisable in the interests of the United States to terminate your client's employment" pursuant to § 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c). The letter also stated that the DCI had reached his decision on the

basis of a review of the facts of Doe's case, Doe's memorandum commenting on those facts, the Office of Security's evaluation of the security significance of those facts, and the letter written by Doe's counsel. Doe received no other statement of the reasons for his termination and no opportunity to respond.

### B. The Original Relief Granted By The District Court, The First Appeal To The Court Of Appeals, And The Decision Of This Court.

Because the prior decisions in this case of the district court, the court of appeals and this Court are relevant to the latest judgment of the court of appeals, we summarize those decisions here.

Doe's amended complaint asserted that the Agency violated both his substantive and procedural rights. Substantively, Doe alleged that the decision to fire him violated his constitutional rights to substantive due process, equal protection and privacy. Procedurally, Doe contended that the DCI, in deciding to terminate his employment, failed to follow the procedures required by the due process clause of the Fifth Amendment, by Agency regulations and by the Administrative Procedures Act (the "APA"). For relief, Doe sought reinstatement to his former position. Alternatively, he sought reinstatement to the administrative leave status in which he had been placed when he first advised the CIA of his homosexuality and a new determination of his eligibility for continued employment under fair procedures.

On Doe's motion for partial summary judgment, the district court granted limited relief. *Doe v. Casey*, 601 F. Supp. 581 (D.D.C. 1985). The court declined to reach the question whether the Agency's actions violated Doe's substantive constitutional rights. *Id.* at 590. Instead, the court granted judgment in Doe's favor solely on the ground that the DCI failed to follow the procedures prescribed by CIA regulations. *Id.* The court granted limited injunctive relief restoring Doe to administrative leave status and ordered the DCI to reconsider his decision to terminate Doe under procedures that would provide Doe with a statement of the

reasons for the action and a meaningful opportunity to respond. *Id.*

On appeal, the court of appeals rejected the CIA's principal argument that the DCI's decision to terminate Doe pursuant to § 102(c) was not judicially reviewable. *Doe v. Casey*, 796 F.2d 1508, 1513, 1517 (D.C. Cir. 1986). The Court then proceeded to consider whether Doe's procedural or substantive rights were infringed by the DCI's decision to terminate him. The Court first considered whether the Agency violated its own regulations in terminating Doe. *Id.* at 1519. Finding that the CIA's regulations imposed no meaningful limits on the DCI's discretion, *id.*, the Court reversed the district court's holding that Doe's procedural rights under the regulations had been violated. *Id.* at 1520.

With respect to Doe's other claims, the court noted that "there is great confusion as to precisely what the Director intended to do in this case." 796 F.2d at 1521. The court stated that if the district court concluded that Doe was terminated as part of a blanket ban on homosexuals "there is an *arguable* claim that can be litigated." *Id.* at 1522 (emphasis in original). The record on that point, the court said, was unclear: on the one hand, two security officers told Doe that his homosexuality violated CIA rules; on the other hand, the Agency's Deputy General Counsel told Doe's counsel that no such *per se* rule existed. *Id.* The court therefore directed the district court to resolve "whether Doe's termination reflects a policy of terminating the employment of all homosexuals." *Id.*

This Court granted the government's petition for certiorari on the limited question whether Congress, when it enacted § 102(c) of the National Security Act, intended to preclude judicial review of a claim by a CIA employee that he unlawfully had been terminated. *Webster v. Doe*, 486 U.S. 592 (1988). With respect to the APA, the Court found that § 102(c) was intended to commit individual employee discharges to the Director's discretion and is drawn in such broad terms that there is no law to apply. Accordingly, the Court concluded that judicial review is precluded by 5 U.S.C. § 701(a)(2) (1977). 486 U.S. at 599-601.

In contrast, the Court held that judicial review of the DCI's decisions under § 102(c) is available for constitutionally-based claims. *Id.* at 603-04. Noting that the reasons for Doe's termination were unclear because of the "inconsistent explanations [Doe] received from the Agency itself regarding his termination," *id.* at 602, the Court remanded the case for consideration of Doe's "constitutional claims and the propriety of the equitable remedies sought." *Id.* at 605. In reaching this result, the Court explicitly declined to consider the government's assertion that, under *Bowers v. Hardwick*, 478 U.S. 186 (1986), a blanket prohibition on employing homosexuals would not present a colorable constitutional claim. 486 U.S. at 604 n.8.[3/]

### C. Proceedings On Remand In The District Court.

On remand, the CIA moved to dismiss Doe's constitutional claims pursuant to Fed. R. Civ. P. 12(b)(6). The Agency argued first that the court of appeals' decision foreclosed Doe's due process claim. With respect to Doe's equal protection claim, the CIA argued that only the lowest level of judicial scrutiny was appropriate and that the decision to terminate Doe was rationally related to concerns that homosexuals are subject to coercion and blackmail by hostile intelligence services. The Agency did not address the question whether it has a blanket policy of excluding homosexuals, notwithstanding the rulings of both this Court and the court of appeals that this factual issue had to be resolved.

The district court permitted Doe to take limited discovery before responding to the CIA's motion. (App. 47a) Doe's discovery requests sought the reasons for his termination and evidence of the Agency's policies and practices on the hiring of homosexuals. In response, the Agency objected to all discovery going to its policies and practices and produced

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[3/] The Court denied Doe's cross-petition for certiorari on the question whether the court of appeals erred in concluding that he was not entitled to know the reasons for the Director's decision to terminate his employment. *Doe v. Webster*, 487 U.S. 1223 (1988).

excerpts of two one-page documents purportedly related to Doe's termination. The first document reflected the decision of the DCI to terminate Doe's employment with the CIA. Signed by the Director, it merely stated: "[u]nder the authority of section 102(c) of the National Security Act of 1947, I deem termination of the employment by the Central Intelligence Agency of [Doe] to be necessary and advisable in the interests of the United States and I hereby terminate that employment effective immediately." *Doe v. Gates*, No. 91-5249, Joint Appendix at 109 (D.C. Cir.). The second document was, according to the cover letter provided by the Agency's counsel, a redacted version of a memorandum prepared by the CIA's Office of Security for the DCI which set forth the recommendation of that Office that Doe be terminated. *Id.* at 102. However, the CIA never filed any declaration or other proof that this memorandum had been presented to the Director or considered by him in reaching his decision to terminate Doe.

Dissatisfied with the CIA's response to his discovery requests, Doe filed a motion to compel. Before ruling, the district court directed the CIA to file *in camera* the unredacted versions of the two documents produced to Doe. (App. 43a) After reviewing these documents, the court denied Doe's motion to compel on the ground that the discovery he sought was not relevant. (App. 41a) Having reviewed the two documents, however, the court ruled that the government's motion to dismiss should be treated as one for summary judgment. (App. 39a)

Doe then filed his opposition to the CIA's motion and cross-moved for partial summary judgment on the ground that he had a protected property interest in continued employment with the Agency. In opposition to the CIA's motion, Doe argued that his equal protection claim could not be decided on the present record. First, Doe argued that issues of fact were in dispute. The CIA still had made no showing to demonstrate whether he was fired because of a blanket policy against employing homosexuals or because of the circumstances of his own homosexuality, a critical factual issue still in dispute. Moreover, the CIA had not demonstrated that the Office of Security memorandum had in fact been the basis for

the DCI's decision.[4] Because of the district court's ruling on Doe's motion to compel, he was unable to develop the record on either of these points. Doe also filed a declaration pointing out a number of erroneous assertions in the Office of Security memorandum.[5]

Second, Doe argued that regardless of the reasons for his discharge, the record was not sufficient to resolve his equal protection claim because the CIA had not demonstrated that there is a rational basis for refusing to employ homosexuals. Third, Doe argued that if the court found a rational basis for his termination, it should decide whether strict or heightened judicial scrutiny should apply. Doe further argued that the resolution of this issue depended in part on whether homosexuality is an immutable characteristic and that this issue could not appropriately be resolved on summary judgment.[6]

The district court granted Doe's cross-motion for partial summary judgment and denied the Agency's motion to dismiss his constitutional claims. The court rejected two of the grounds on which Doe based his property interest claim: (1) § 102 of the National Security Act; and (2) the Agency's regulations. (App. 32a-34a) However, the district court

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[4] Doe also asserted that the Office of Security memorandum could have been created as a pretext to conceal the Agency's policy against employing homosexuals that had earlier been expressed to Doe by one of the Agency's security officers. The CIA provided no declarations or other evidence to respond to that point.

[5] For example, the memorandum incorrectly argued that Doe "hid his involvement in homosexual activity although he knew it was a matter of security significance." *Doe v. Gates*, No. 91-5249, Joint Appendix at 108 (D.C. Cir.). The memorandum further criticized Doe for his alleged "reluctance to reveal any information about his partners," and for declining to identify how many partners he had had. *Id.* From those alleged "facts," the memorandum concluded that Doe "might be susceptible to threats of exposure" and that his conduct might expose the Agency to "notoriety and undesired publicity." *Id.* Doe disputed all of these alleged "facts." *Id.* at 84-87.

[6] On remand, Doe abandoned his substantive claim based on his constitutional right to privacy.

sustained Doe's claim that Agency-fostered understandings had created such a property right. (App. 35a-36a)

Having found that Doe had a protected property interest in continued employment, the district court ordered that he be given minimal procedural protections: a statement of the reasons for his termination and an opportunity to respond. *Id.* Because the court found a genuine issue of material fact with respect to whether Doe was terminated as part of a blanket ban on homosexuals, it denied the Agency's motion for summary judgment. (App. 37a) Although unnecessary to its disposition of the pending motions, the district court also stated that Doe asserted no colorable equal protection claim. (App. 29a-32a)

**D. The Court of Appeals' Decision.**

In the court of appeals, the CIA argued that the district court erred in finding that Doe had a protected property interest in continued employment with the Agency. First, the CIA contended that because this Court had concluded that § 102(c) commits discharge decisions to the Director's discretion, the statute cannot confer any property right protected by the Constitution. The Agency further argued that even if § 102(c) did not preclude the finding of a property right, nothing in the Agency's policies or practices had fostered an understanding with Doe that his employment would continue so long as he did a good job.

In response, Doe argued that § 102(c) entitled him to the minimal procedural protections ordered by the district court. Relying on this Court's decisions in *Service* v. *Dulles*, 354 U.S. 363 (1957) and *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), Doe contended that under the statute employees do not serve at the will or pleasure of the Director, and that the Director's termination decisions must therefore meet constitutional requirements. Doe further argued that the Agency's policies and understandings with him reinforced the expectation of continued employment created by § 102(c).

Alternatively, Doe asserted that even if the district court erred in concluding that he had a protected property interest

in continued employment, summary judgment in the CIA's favor nevertheless properly was denied because genuine issues of material fact exist with respect to the reasons for his discharge. Doe noted that both the court of appeals in its first opinion and this Court had remanded the case for determination of the reasons for his discharge and consideration of his constitutional claims on the basis of an adequate record. Because the district court had limited Doe's discovery and the CIA had not introduced sufficient evidence, there still was nothing in the record demonstrating whether Doe was terminated as part of a blanket ban on the employment of homosexuals, or because the circumstances of his own homosexuality posed a security threat. Moreover, Doe argued that regardless of the reasons for his termination, the CIA had not shown that its action had a rational basis. Doe also pointed out that the Agency had made no response to his claim of disparate treatment. Finally, Doe argued that even if the Agency's action were held to be rationally-based, he was entitled to prove to the district court that homosexuals merit strict or heightened judicial scrutiny of government actions that burden them.

The court of appeals unanimously dismissed Doe's due process claim and reversed the district court's judgment. The court concluded that § 102(c) exudes deference to the Director's termination decisions and places those decisions outside the protections of the due process clause. (App. 12a-13a) The court also concluded that whatever understandings the Agency may have fostered with Doe, those understandings were insufficient to create a property interest in continued employment if the effect would be to contravene the terms of § 102(c). (App. 13a-15a)

The court also rejected Doe's equal protection claim, but each judge wrote separately on that issue. Judge Sentelle held that there was no evidence to support Doe's assertion that the CIA had a blanket policy banning homosexuals and that summary judgment in the Agency's favor therefore was appropriate. (App. 18a-20a) Judge Sentelle further concluded that even if there were evidence suggesting that the CIA had a blanket ban, judgment in the CIA's favor was proper

because the record also shows that Doe's termination was based on the facts of his case. (App. 20a-21a)

Judge Edwards concurred only in the court's judgment with respect to the equal protection claim. In his view, summary judgment on that claim was appropriate because "there is no evidence in the record that reasonably supports a claim that [the CIA] has a blanket policy against homosexuals," and "no evidence that contradicts the Government's position that the CIA discharged [Doe] after an individualized assessment of the circumstances of his case, rather than pursuant to a blanket bar." (App. 23a)

Finally, Judge Randolph joined in the disposition of the equal protection claim only insofar as it held that Doe's termination resulted from individualized consideration of his case. (App. 24a) In Judge Randolph's view, the holding that Doe had failed to present any evidence of a blanket ban was "mistaken." (*Id.*) Judge Randolph noted that this Court had held that two statements by CIA security officers to Doe "support Doe's claim that 'a pervasive discrimination policy exists in the CIA's employment practices regarding *all* homosexuals.'" (*Id.*) (quoting *Webster* v. *Doe*, 486 U.S. at 602) (emphasis in Judge Randolph's opinion). Judge Randolph also concluded that Doe should be allowed to rely on evidence of a blanket CIA policy that had been held sufficient to survive summary judgment in *Dubbs* v. *CIA*, 866 F.2d 1114 (9th Cir. 1989). (App. 25a-26a)

The court denied Doe's timely petition for rehearing and suggestion for rehearing *en banc*. (App. 2a-7a) However, in a separate statement, Judge Wald, noting the "changing social and political climate of our times," indicated that she was "troubled by the broad language in Judge Sentelle's opinion" suggesting that the CIA can take adverse personnel action against homosexuals so long as that action does not stem from a blanket policy. (App. 4a) Judge Wald wrote that "[t]he important thing is that a discriminatory action may give rise to an equal protection challenge, whether pursued under a general policy or an individualized determination." (App. 4a-5a) Judge Wald added that while she had "misgivings as to the suitability of this record for summary judgment, I realize

that that kind of fact-based issue does not normally warrant en banc consideration." (App. 4a).

## REASONS FOR GRANTING THE WRIT

This case raises questions of exceptional public importance. First, the case presents the question whether long-term employees of the CIA must be afforded even minimal procedural protections prior to having their employment terminated by the Agency. The court of appeals' decision on this point is in direct conflict with this Court's precedents. Second, the case raises issues concerning the right of a government agency to terminate an employee because of that employee's sexual orientation, and the nature of the showing the agency must make to sustain such adverse personnel action. On this point, the decision of the court of appeals conflicts with the holding of the Ninth Circuit in *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989). Because these issues have great legal and social significance, the Court should grant this petition.

### I. THE DECISION OF THE COURT BELOW THAT DOE HAS NO CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN CONTINUED EMPLOYMENT WITH THE CIA CONFLICTS WITH THIS COURT'S *SERVICE* AND *ARNETT* DECISIONS.

The Court has explained that when government employment is involved, "the earliest cases of this Court have distinguished between two situations, where entitlement to the job is conditioned 'at the pleasure' of the employer and where the job is to be held subject to certain requirements being met by the employee, as when discharge must be for 'cause.'" *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (White, J., concurring in part, dissenting in part). "Where the Congress has confined Executive discretion, notice and hearing have been required." *Id.* at 182.

The court below concluded that CIA employees serve at the Director's pleasure and that his termination decisions are not subject to the procedural protections of the due process

clause. (App. 12a-13a) Having so found, the court further held that whatever informal understandings the Agency had fostered with Doe could not operate to create a property right in contravention of § 102(c). (App. 13a-15a) However, the court's interpretation of § 102(c) directly conflicts with this Court's construction of the same language in *Service* v. *Dulles*, 354 U.S. 363 (1957).

The Court's *Service* decision demonstrates that § 102(c) is not an at-will employment statute. The statute at issue in *Service* — the so-called McCarran Rider — provided, in exactly the same words as § 102(c), that the Secretary of State could terminate the employment of any Department official when "he shall deem such termination necessary or advisable in the interests of the United States." 354 U.S. at 370 (citation omitted).[7/] The plaintiff in *Service* challenged his dismissal from the State Department, *inter alia*, on the ground that in ordering his termination the Secretary failed to comply with regulations governing separation from employment. Adopting a construction of the McCarran Rider identical to the court of appeals' construction of § 102(c) in this case, the court of appeals in *Service* held that Congress had intended to grant the Secretary of State the "power of summary dismissal" and that the Secretary therefore was not required to provide procedural protections afforded by the agency's regulations prior to terminating an employee. *Service* v. *Dulles*, 235 F.2d 215, 218 (D.C. Cir. 1956), *rev'd*, 354 U.S. 363 (1957).

This Court reversed the judgment of the court of appeals. The Court concluded that the Secretary was, in fact, bound

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[7/] More fully, the statute provided that:

> [n]otwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion . . . terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .

60 Stat. 458 (1946).

by agency regulations in exercising his authority under the statute. 354 U.S. at 373-81. The Court stated succinctly that "the lower courts thought that the Secretary was powerless to bind himself by [the] Regulations as to McCarran Rider discharges . . . . We do not think this is so." *Id.* at 380. Quite clearly, had the Court concluded that the McCarran Rider was an at-will statute, it could not have held that the Secretary's discretion was limited by regulation. Such a holding would have been inconsistent with Congress' intent in writing an at-will statute. As then-Judge Scalia pointed out, no agency "rules . . . can contravene the intent of the legislature regarding the employment entitlements that can be conferred." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Thus, if the McCarran Rider had been an at-will statute, the Secretary of State could not have limited his discretion through the regulations that gave the employee in *Service* his protections.

The Court's *Service* holding plainly dictates the conclusion that § 102(c) is not an at-will statute. Instead, § 102(c) provides a standard that confines the Director's discretion: he may terminate employees only when it is "necessary or advisable in the interests of the United States." Because "Congress has confined Executive discretion," *Arnett*, 416 U.S. at 182, and set a standard that must be met by the Director, the statute creates a property interest, and "notice and hearing [are] required." *Id.*

This point is confirmed by this Court's decision in *Arnett*. In that case, the Court construed the Lloyd-LaFollette Act which, until it was replaced by the Civil Service Reform Act of 1978, governed federal employees in the competitive service. The Lloyd-LaFollette Act provided that "[a]n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501(a) (1976) (repealed).[8/] Although the Lloyd-LaFollette Act vested

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[8/] The Civil Service Reform Act of 1978 retains the same substantive standard for removal as the Lloyd-LaFollette Act. 5 U.S.C. § 7513(a) (1988).

unusually broad discretion with respect to firing decisions, the fact that it established an objective standard for removal was held by the Court to create a property interest in federal employment that was protected by the due process clause. *Arnett*, 416 U.S. 134.[2/]

Section 102(c) provides that the DCI "may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c) (1991). Congress did not authorize the DCI to terminate employees at his whim or for any reason at all. Rather, the DCI's discretion under the statute must be exercised with reference to an objective standard — whether the proposed action is "necessary or advisable in the interests of the United States." By enacting that standard, Congress created a reasonable expectation that CIA employees will be terminated only when the DCI determines that termination meets that standard. The contrary result reached by the court of appeals directly conflicts with this Court's decisions in *Service* and *Arnett*.

To be sure, this Court in its earlier opinion in this case concluded that the Director's termination decisions under § 102(c) are agency action "committed to agency discretion by law" and therefore removed from the judicial review provisions of the APA. *Webster* v. *Doe*, 486 U.S. at 600. However, the fact that the Director's firing decisions are not subject to judicial review under the APA does not mean that employees serve at his will or pleasure. The question whether a statute provides an objective standard to guide the exercise of agency discretion is distinct from the question whether the exercise of that discretion is committed by law to the agency such that review under the APA is unavailable. As *Arnett* makes clear, the inclusion of an objective standard creates an expectation of continued employment which entitles

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[2/] All of the Justices in *Arnett* agreed that the Lloyd-LaFollette Act created a statutory expectancy which gave rise to constitutionally required procedural protections, although they divided on the extent of the protections required. That confusion was resolved by the Court's decision in *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985).

Doe to minimal procedural protections, irrespective of the degree of deference the statute affords in applying the objective standard.

The court below erred in concluding that § 102(c) creates no protectable property right, and the Court should grant certiorari to correct that error.

## II. THE DECISION BELOW LEAVES EXECUTIVE AGENCIES IMPERMISSIBLY FREE TO DISCRIMINATE AGAINST HOMOSEXUAL EMPLOYEES.

In its earlier decision in this case, this Court observed that the reasons for Doe's discharge were unclear because, in part, of "the inconsistent explanations [Doe] received from the Agency itself regarding his termination." 486 U.S. at 602. For that very reason, the Court remanded the case for consideration of Doe's "constitutional claims and the propriety of the equitable remedies sought." *Id.* at 605. Despite the remand ordered by the Court, the CIA never came forward with the reasons for Doe's termination, and the record is no clearer today than when the Court delivered its opinion.[10/] Regardless, however, of whether Doe was terminated because of a blanket prohibition against employment of homosexuals (one reason supported by the record) or based on individualized consideration of his homosexuality (another reason with support in the record), the decision of the court below leaves executive branch agencies impermissibly free to discriminate against homosexual employees. The Court should grant certiorari to correct that significant error and to resolve conflict among the circuits.

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[10/] The CIA never demonstrated that the Office of Security memorandum cited by the court of appeals had any relationship to Doe's termination, and in any event, Doe filed a declaration demonstrating that the memorandum was a distortion of what he told the CIA's security officers.

### A. A Blanket Ban On Homosexuals Violates The Equal Protection Guarantee Of The Fifth Amendment.

If Doe was terminated pursuant to a blanket ban on homosexuals, he has stated a colorable constitutional claim that should not have been dismissed at this stage of the litigation. *See Dubbs*, 866 F.2d at 1119 n.8 ("we necessarily decide that a blanket policy of security clearance denials to all persons who engage in homosexual conduct would give rise to a colorable equal protection claim"). Under the rational basis test, government action must be "rationally related to a legitimate . . . purpose" in order to survive judicial scrutiny. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985). Thus, even under this lowest level of scrutiny, a court must consider: (1) whether the government's purpose in acting is legitimate; and (2) whether there is evidence to support the government's assertion that disparate treatment of a group disadvantaged by the classification promotes that purpose. *Id.* at 446-50. As the Court has made clear, the rational basis test "'is not a toothless one.'" *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). At a minimum, the test assures that government action is not based on prejudice or bias against a particular group.[11/]

On remand, the Agency failed to proffer any evidence whatsoever justifying a blanket ban against homosexuals. While the district court concluded that "[h]omosexuals engaging in homosexual conduct pose a greater security risk than heterosexuals[,]" (App. 31a), that conclusion finds no evidentiary support whatsoever in the record. More

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[11/] Doe's equal protection claim is not barred by this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Hardwick* the Court addressed the narrow question whether there is a fundamental privacy right to engage in consensual sodomy. *Id.* at 190. In its opinion in this case, the Court explicitly declined to address whether Doe's equal protection claim was foreclosed by *Hardwick*. *Webster v. Doe*, 486 U.S. at 604 n.8. Indeed, the Court ordered a remand despite its explicit recognition that Doe had engaged in homosexual conduct. *Id.* at 595.

importantly, the conclusion overlooks the fact that any person's sexuality — homosexual or heterosexual — makes them a potential target of coercion and blackmail. Since heterosexuals as well as homosexuals can be targets of compromising seductions or engage in indiscretions that make them vulnerable to coercion, it is not rational to assume that homosexuals as a group pose a greater security risk than heterosexuals as a group.

In *Cleburne*, the Court held that a city's scheme for licensing homes for the mentally retarded violated the equal protection clause of the Fourteenth Amendment because the scheme was premised on fears about the mentally retarded and therefore lacked a rational basis. 473 U.S. at 448-50.[12/] In so holding, the Court rejected the notion that government action can be rational when based upon group prejudice. A blanket ban on the employment of homosexuals by the CIA is based on irrational fears and biases about homosexuals and cannot survive analysis under the equal protection guarantee of the Fifth Amendment.

### B. By Suggesting That Agency Action Based On Individualized Consideration of An Employee's Homosexual Conduct Necessarily Is Constitutional, The Decision Below Conflicts With The Ninth Circuit's *Dubbs* Decision.

The court below premised its decision on its view that the Agency had acted only after considering the circumstances of Doe's homosexuality. (App. 20a-21a). In so holding, the court overlooked Doe's claims of disparate treatment, and its decision conflicts with the Ninth Circuit's decision in *Dubbs*, 866 F.2d 1114.

In *Dubbs*, the Ninth Circuit reversed a district court's conclusion that individualized consideration by the CIA of

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[12/] The Court observed that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 448 (quotation omitted).

homosexual conduct engaged in by applicants for security clearances necessarily is constitutional. *Id.* at 1118. Like Doe, the plaintiff in *Dubbs* argued "that the CIA treats any and all homosexual conduct as a negative factor in security clearance determinations, but only considers heterosexual conduct a negative factor where promiscuity or extra-marital relations actually reflect lack of judgment or discretion or actually offer a potential for exploitation by a foreign intelligence service." *Id.* at 1119 (internal quotation omitted). The Ninth Circuit reversed the dismissal of plaintiff's claim because there was no evidence in the record to justify such disparate — albeit individualized — treatment of homosexuals. As *Dubbs* demonstrates, claims of disparate treatment are cognizable under the equal protection guarantee of the Fifth Amendment even if an agency bases its decision to terminate a homosexual employee on the particular facts of that employee's case. 866 F.2d at 1119-20. *See also* Statement of Judge Wald. (App. 4a)

This case presents numerous questions of disparate treatment. Doe has asserted that the security significance of sexual conduct is weighed differently by the CIA when that conduct is engaged in by homosexuals versus heterosexuals. Suppose a heterosexual employee of the CIA revealed to the Office of Security that he or she had engaged in premarital or extramarital relationships, including conduct that falls within the definition of sodomy.[13/] Would the Agency, as it did in Doe's case, have concluded that this person "hid" information of security significance and demonstrated that he or she cannot be trusted by the Agency? Would the Agency insist, as it did to Doe, that the heterosexual identify all his or her partners, when there was no showing that any of the partners were foreign nationals or had attempted to solicit classified information and no showing that the heterosexual had disclosed any classified information to them? If, as Doe did, the heterosexual declined to identify his or her partners,

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[13/] Sodomy statutes typically criminalize oral and anal sex irrespective of whether such acts occur between members of the same or different sexes. *See, e.g.*, D.C. Code § 22-3502 (1989); Md. Code, Art. 27, § 554 (1990), Va. Code § 18.2-361 (1988).

would the Agency conclude that the heterosexual might be susceptible to blackmail or coercion? Does the CIA require its adulterous employees to identify their partners? Is an unmarried homosexual like Doe, who is open and unembarrassed about his or her homosexuality more prone to blackmail than a married heterosexual who engages in adultery, which like heterosexual sodomy is a crime?[14/] Would the Agency conclude, as it did in Doe's case, that a heterosexual's involvement in premarital or extramarital sexual activity exposes the Agency to undesired publicity?

The record in this case sheds no light on these important questions. The Court should grant certiorari to resolve the conflict between the District of Columbia Circuit and the Ninth Circuit over whether answers must be provided before Doe's claims can be dismissed.[15/]

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[14/] *See, e.g.*, D.C. Code § 22-301 (1989); Md. Code, Art. 27, § 4 (1990); Va. Code § 18.2-365 (1988).

[15/] Because the courts below did not reach the question whether homosexuals are entitled to heightened or strict judicial scrutiny of government action that burdens them, Doe's petition does not present that question. The issue is one that has divided the federal courts. *Compare Doe v. Gates*, 981 F.2d at 1324 (App. 21a) (rational basis standard) and *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991) (same) *with Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) (active rational basis standard), and *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring) (strict scrutiny standard), *cert. denied.*, 498 U.S. 957 (1990) and *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (same), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3803 (U.S. June 1, 1993). If the Court grants this petition and decides all the questions presented adversely to Doe, it would still be appropriate to remand the case for a determination whether heightened or strict scrutiny of Doe's claims is applicable.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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June 21, 1993

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 91-5249

September Term, 1992
CV 82-02016

John Doe

v.

**FILED MAY 3, 1993**

William Webster, Director
Central Intelligence, et al.

Appellants

BEFORE: Edwards, Sentelle and Randolph, Circuit Judges

**ORDER**

Upon consideration of appellant's Motion to Stay Mandate, it is

ORDERED, by the Court, that the Clerk is directed to withhold issuance of the mandate through June 23, 1993.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 91-5249

September Term, 1992
CV 82-02016

**FILED MAR 23, 1993**

John Doe

v.

William Webster, Director
Central Intelligence, et al.

Appellants

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

## ORDER

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Wald is attached.

## Separate Statement of Judge Wald

I do not seek rehearing en banc because, despite some problematic language in the opinions, their net effect is not to set a precedent that, to be cognizable under the equal protection component of the Fifth Amendment, discrimination against homosexual federal employees must be done pursuant to a "blanket policy" of the agency. As I read the opinions, two judges found that Doe's claim failed because he could not muster evidence countering the CIA's showing that Doe's dismissal resulted from a rational, individualized consideration of his general trustworthiness. *See Doe v. Gates*, No. 91-5249 (D.C. Cir. Jan. 12, 1993), Slip Opinion of Judge Edwards at 1 ("Doe has pointed to nothing in the record that might reasonably be viewed to suggest that he suffered disparate treatment in his disciplinary assessment by virtue of his homosexuality."); Slip Opinion of Judge Randolph at 3 ("Doe was fired . . . for decidedly individualized reasons."). While I have misgivings as to the suitability of this record for summary judgment, I realize that that kind of fact-based issue does not normally warrant en banc consideration.

I am, however, troubled by the broad language in Judge Sentelle's opinion suggesting that "no further inquiry is needed" once the court determines that there is no blanket policy against homosexuals. *See* Slip Opinion of Judge Sentelle at 10; *see also Doe v. Casey*, 796 F.2d 1508, 1523 (D.C. Cir. 1986) (suggesting in dicta that a dismissal based on *Doe's* homosexuality would not present a colorable constitutional claim). The core challenge in an equal protection suit based on homosexuality is that a person has been treated differently by the government because of his or her sexual orientation. While such disparate treatment may be inflicted pursuant to an agency-wide policy (de jure or de facto), it certainly need not be (and given the changing social and political climate of our times, it is increasingly unlikely to be). The important thing is that a discriminatory action may give rise to an equal protection challenge, whether

pursued under a general policy or an individualized determination. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.14 (1977) ("This is not to say that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions."); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986) ("An equal protection plaintiff . . . need not prove a discriminatory policy against an entire class; discrimination against the plaintiff because of her membership in the class is by itself enough."); *see also Dubbs v. CIA*, 866 F.2d 1114, 1120 (9th Cir. 1989) (noting that colorable equal protection claim of homosexual employee depends on allegation of disparate treatment of homosexuals and heterosexuals and implying that individualized consideration is not automatically constitutional).

Although individualized consideration militates toward more rational, and presumptively constitutional, decision-making than blanket rules, there is no guarantee that all individualized considerations are per se rational or constitutional, especially where sexual orientation is concerned. Once it is shown that a governmental decision adverse to an individual has been affected to some degree by the individual's sexual orientation or conduct — or, put another way, once it is put in doubt that a similarly situated heterosexual employee would have been treated the same way — the government has the task of proving that its decision, whether based on individualized or generic grounds, is rational and free of constitutional taint. *Cf. Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991) (once discrimination is demonstrated, the government must show on the record that its decision has a rational basis), *cert. denied*, 113 S. Ct. 655 (1992).

Within this context, *i.e.*, my understanding that the holding in *Doe* does not contradict these principles, and, despite some concern with the evidence-specific determinations of the panel, I do not seek rehearing en banc in this case.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 91-5249 - September Term, 1992
CV 82-02016

**FILED MAR 23, 1993**

John Doe

v.

William Webster, Director
Central Intelligence, et al.

Appellants

BEFORE: Edwards, Sentelle and Randolph, Circuit Judges

**O R D E R**

Upon consideration of appellee's petition for rehearing, filed February 26, 1993, it is

**ORDERED**, by the Court, that the petition is denied.

*Per Curiam*
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued October 26, 1992 Decided January 12, 1993

No. 91-5249

JOHN DOE

v.

ROBERT M. GATES, DIRECTOR OF CENTRAL INTELLIGENCE, APPELLANT

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Appeal from the United States District Court
for the District of Columbia
No. 82-02016

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Sentelle, *Circuit Judge*: This is a lawsuit by a Central Intelligence Agency ("CIA") employee claiming that his constitutional rights were violated when he was terminated for reasons related to his homosexual activity. On remand from the Supreme Court and this Court, the District Court concluded that the agent's equal protection claim was not supported on the record, but that he had a property interest in continued employment warranting due process protection not afforded in the Agency's termination procedures. Based on these conclusions, the Court granted summary judgment in favor of the plaintiff. Because we agree with the first conclusion but not the second, we reverse the grant of summary judgment.

## I.

Because many of the facts are laid out by us in our prior opinion, *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986), *cert. denied*, 487 U.S. 1223 (1988), as well as by the Supreme Court, *Webster v. Doe*, 486 U.S. 592 (1988), we will revisit and augment them only as necessary to provide foundation for discussion of the particular issues addressed herein.

The CIA hired John Doe in 1973 as a clerk-typist, and seven years later promoted him to an undercover position. In periodic fitness reports, the Agency consistently rated him as a strong or outstanding employee. Though Doe began engaging in homosexual activities in 1976, he did not inform the CIA of his sexual orientation until January 28, 1982. Shortly thereafter, he was placed on paid administrative leave, and has continued to collect his salary through the course of this litigation.

In May of 1982, the Director of Central Intelligence discharged Doe, pursuant to § 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c) (1982). That section provides that the Director of Central Intelligence "may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." A letter to Doe's counsel from the Deputy General Counsel for the CIA stated that the Director had reached his decision on the basis of a review of the facts in Doe's case, and included a memorandum containing the Office of Security's evaluation of the security significance of those facts.

Doe brought this action against the Director in District Court, seeking injunction and declaratory relief. Alleging that his discharge was prompted by his admission of

homosexuality, Doe asserted that the Director violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1982), because the decision to fire him was arbitrary, capricious, an abuse of discretion, and had been reached without adhering to procedures required by law and by CIA regulations. In addition, Doe claimed that his discharge violated his constitutional rights to "fundamental fairness," privacy, and equal protection, and deprived him of property and liberty without due process.

The District Court did not reach Doe's constitutional claims, but held that the CIA had violated Doe's procedural rights under the APA by dismissing him without the due process protections afforded by the agency's own regulations. *Doe v. Casey*, 601 F. Supp. 581 (D.D.C. 1985). On appeal, the Court held that § 102(c) — which permits the Director in his discretion to fire any employee when he deems discharge necessary or advisable in the interests of the United States — did not preclude judicial review of Doe's termination. *Doe v. Casey*, 796 F.2d 1508, 1513-19 (D.C. Cir. 1986). However, we reversed the District Court's holding that Doe's discharge had violated CIA regulations, noting that the regulations clearly intended to protect the discretion granted the Director by § 102(c) of the National Security Act. 796 F.2d at 1519-20.

We concluded that the viability of Doe's remaining claims depended on the Director's intent in invoking § 102(c). If the Director intentionally had invoked § 102(c) without reasons, "there are no grounds to reverse the Director's decision . . . and, correspondingly, no bases for requiring the Director to explain his exercise of discretion." 796 F.2d at 1522. However, we held that if the Director had dismissed Doe under § 102(c) because of a CIA blanket policy against hiring homosexuals, then the CIA would have to explain how the policy conforms to the statutory mandate that the policy be "necessary or advisable in the interests of the United States." *Id.* Finally, if the Director acted pursuant to

§ 102(c) because Doe's homosexuality presented a specific security risk, we noted that Doe's procedural right not to be deprived of his liberty interest in his reputation without due process might be implicated, *id.* at 1522-24, but held that the CIA had already provided sufficient due process to satisfy the Fifth Amendment through its informal notice and opportunity to respond. *Id.*

The Supreme Court granted the government's petition for certiorari on the question whether any judicial review under the APA existed of the Director's decision to terminate an employee under § 102(c). *Webster v. Doe*, 482 U.S. 913 (1987). In a cross-petition, Doe sought review of whether this Court had erred in holding that he was not entitled to any explanation of the Director's decision to discharge him. The Supreme Court denied his petition. *Doe v. Webster*, 487 U.S. 1223 (1988).

On the government's petition, the Supreme Court held that "§ 102(c) indicate[s] that Congress meant to commit individual employee discharges to the Director's discretion," and that any judicial review under the APA was therefore precluded. *Webster v. Doe*, 486 U.S. 592, 601 (1988). Nonetheless, the Supreme Court ruled that "colorable constitutional claim[s]" arising out of a discharge were not similarly immune from judicial review. *Id.* at 604-05. The Court remanded the case, charging the District Court to "address [Doe's] constitutional claims and the propriety of the equitable remedies sought." *Id.* at 605.

On remand, the parties filed cross-motions for summary judgment. The District Court held that although Doe had failed to state a colorable equal protection claim, *Doe v. Webster*, 769 F. Supp. 1, 2-3 (1991), he had a Fifth Amendment property interest in continued employment at the CIA based upon an "agency-fostered understanding." *Id.* at 3-5. The District Court based its finding of an agency-fostered understanding on two sources. First, it pointed to a

CIA booklet on Agency policy prepared for incoming personnel which stated both that the Agency has the authority to discharge any employee "who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively," and that "[e]xcept for the continuing responsibility to avoid disclosure of information affecting national security, Agency employees are under no formal restrictions beyond those governing the conduct of Federal workers as a whole." *Id.* at 5. In addition, the District Court relied on Doe's affidavit, in which he averred that unidentified CIA employees told him, at the beginning of his employment at the CIA, that "once his probationary period was completed, he would continue to be employed as long as his services were needed, his work was well done, he complied with security regulations, and protected classified information from unauthorized disclosure." *Id.*

The District Court therefore entered summary judgment in favor of Doe, concluding that the CIA had deprived Doe of his job — in which he had a constitutionally cognizable property interest — without affording him adequate process, requiring "[a]t a minimum" notice and the opportunity for a hearing. *Id.* The government appealed.

## II.

The Supreme Court has long held that the constitutional guarantee of due process extends to protect property interests, broadly defined as the "interests that a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). Property interests in employment are not themselves constitutionally created; rather, they are derived from independent sources, such as statutes, regulations, ordinances, or "existing rules or understandings . . . that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577; *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972). The rules and understandings on which an employee bases his Fifth

Amendment claims, however, must create an "objectively reasonable expectation" of continued employment. *Hall v. Ford*, 856 F.2d 255, 266 (D.C. Cir. 1988).

Here, § 102(c) of the National Security Act of 1947 "exhibits . . . extraordinary deference to the Director in his decision to terminate individual employees." *Webster v. Doe*, 486 U.S. 592, 601 (1986). Indeed, the Act expressly confers upon the Director the "discretion [to] terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. § 403(c) (punctuation omitted). Nor do the regulations and policies of the CIA contradict the statutory grant of discretion to the Director. *See* CIA Reg. HR 20-27 (1978); *see also Doe v. Casey*, 796 F.2d 1508, 1519-20 (D.C. Cir. 1986) ("We cannot imagine how the CIA could have more plainly expressed its intent to protect the discretion granted it by section 102(c)."), *aff'd in part, rev'd in part*, 486 U.S. 592 (1988).

The District Court held that although the National Security Act does not provide Doe with a property interest in his employment, the Agency handbook and statements allegedly made to Doe at the outset of his employment raised "agency fostered understandings" endowing Doe with a cognizable property interest. 769 F. Supp. at 5. We disagree.

Although such provisions and statements may in some contexts be sufficient to confer a "legitimate claim of entitlement" as defined in *Board of Regents v. Roth*, 408 U.S. at 577, *see, e.g., Ashton v. Civiletti*, 613 F.2d 923, 928-30 (D.C. Cir. 1979), this is not such a case. Understandings which in other circumstances might suggest the existence of a property right cannot do so when they are at odds with "the intent of the legislature regarding the employment entitlements that can be conferred." *Carducci v. Regan*, 714 F.2d 171,

177 (D.C. Cir. 1983); *see also Batterton v. Texas Gen. Land Office*, 783 F.2d 1220, 1223-24 (5th Cir.), *cert. denied*, 479 U.S. 914 (1986); *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1099 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Baden v. Koch*, 638 F.2d 486, 490-91 (2d Cir. 1980). The law is clear that if a statute relegates termination decisions to the discretion of the Director, no property entitlement exists, *see Chilingririan v. Boris*, 882 F.2d 200, 205 (6th Cir. 1989); *Windsor v. The Tennessean*, 719 F.2d 155, 159 (1983), *cert. denied*, 469 U.S. 826 (1984), and any employee's statements to the contrary have no binding force. *See Bollow*, 650 F.2d at 1100; *Baden*, 638 F.2d at 493. "[M]utual understandings and customs [can] not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes." *Id.* at 492; *see also Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 447-48 (2d Cir. 1980); *Stone v. Philbrook*, 528 F.2d 1084, 1092-94 (2d Cir. 1975); *Fiorentino v. United States*, 607 F.2d 963, 967 (Ct. Cl. 1979) ("We find nothing in the Supreme Court or D.C. Circuit decisions to suggest that . . . 'agency fostered policies and understandings' could override . . . the limitations of express statutes or regulations having the force of statutes . . . ."), *cert. denied*, 444 U.S. 1083 (1980). Therefore, when government employees offer assurances that conflict with federal law, they do not speak for the United States. *See OPM v. Richmond*, 496 U.S. 414, 424-26 (1990); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

Whether Doe actually knew of the existence of § 102(c) is irrelevant. Federal employees are chargeable with knowledge of governing regulations or statutes, and "it is well established that anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority." *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1100 (9th Cir. 1981); *see also Federal Crop Ins. Corp.*, 332 U.S. 380, 384-85; *Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir.

1981) (quoting *Schuster v. Comm'r*, 312 F.2d 311, 317 (9th Cir. 1962) ("Congress's legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official.")). Thus, Doe's reliance on alleged statements by other employees and general provisions in the Agency handbook does not constitute a reasonable "legitimate expectation of continued employment," *Hall v. Ford*, 856 F.2d at 265-66, as required by law.[1/]

Because we reject the District Court's conclusion that Doe had a cognizable property interest in continued employment, we must reverse the District Court's grant of summary judgment based on its holding that the termination violated such an interest.

## III.

Doe also asserts a claim that his termination violated the constitutional guarantee of equal protection. He argues that:

> The evidence to be introduced at the trial of this action will show either that: (a) the CIA had a policy barring the employment of known homosexuals; or (2) Doe was terminated based on individualized consideration of his homosexuality. Either way, Doe has a colorable equal protection claim under the lowest level of judicial scrutiny.

Appellant's Br. at 37. We disagree.

The CIA argues at the outset that this issue is not properly before us. In the Agency's view, Doe forfeited his

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[1/] We do not address the question whether the Director by a general exercise of his discretion could insert in Agency handbooks some language sufficient to create a property interest, if that discretion were exercised in a manner consistent with the intent of the statute. The general language in the present record indicates no such intent or action by the Director here.

right to assert this argument when he failed to file a cross-appeal from the decision of the District Court. The Agency's position ignores the relative roles of the two courts at this stage. It is not the memorandum of the District Court accepting the CIA's argument on the equal protection argument and rejecting Doe's that is before us for review. Rather, we review the District Court's order granting summary judgment in favor of Doe and denying summary judgment to the CIA. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions . . . ."); *see also Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action."); *McClung v. Silliman*, 19 U.S. 598, 603 (6 Wheat.) (1821) ("The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed.").

In reviewing summary judgment decisions, we decide *de novo* the same question that was before the District Court. That is, we must determine whether there is on the record "no genuine issue as to any material fact." Fed. R. Civ. Pro. Rule 56(c). If so, then we determine whether "the moving party is entitled to a judgment as a matter of law." *Id.* Therefore, with the full record before us as it was before the District Court, we may make that determination on grounds which differ from those upon which the District Court relied. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason'") (citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)). *See also Lum Wan v. Esperdy*, 321 F.2d 123, 125-26 (2nd Cir. 1963). *Cf. California Bankers Ass'n v. Shultz*, 416 U.S. 21, 71 (1974) (nothing that "[plaintiffs] are free to urge in this Court reasons for affirming the judgment of the District Court

which may not have been relied on by the District Court."). That being the case, while it might have assisted the efficient path of appellate review had appellee filed a cross-appeal, it is not necessary that he do so in order for him to argue that the District Court's decision in denying summary judgment to the agency was correct, albeit for a different reason.

Although we find the equal protection argument to be properly before us, we do not find it meritorious. Assuming without deciding that a blanket Agency policy against the employment of homosexuals would violate equal protection rights under the Fifth Amendment to the Constitution, the District Court nonetheless properly allowed summary judgment dismissing Doe's equal protection claim.[2/] The record before the District Court, and derivatively this Court, supports the conclusion that the agency is entitled to summary judgment on the claim. Under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 322. By that standard, there remains no material issue of fact relevant to the allegations undergirding Doe's equal protection claim. Plainly, the agency will prevail at the summary judgment stage if the evidence discloses no harm to Doe as a result of such policy as he alleges; that is, if Doe's employment was terminated on a basis unrelated to the policy or because no such policy exists in the first place.

Obviously, if no such policy exists, that is, if there is no material issue of fact as to whether the CIA has a blanket policy against homosexuals, no further inquiry is needed. Appellant has pointed us to no evidence, nor have we found any independently, to support the existence of such a policy.

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[2/] "The equal protection component of the [F]ourteenth [A]mendment is binding upon the federal government as part of the [F]ifth [A]mendment's due process clause." *Padula v. Webster*, 822 F.2d 97, 101 n.5 (D.C. Cir. 1987).

Doe did claim in his original affidavit that "a CIA security officer on January 29, 1982 . . . told [him] that [his] homosexual activities had violated CIA regulations," and that "on February 2, 1982, another CIA official who, [Doe] *believe[d] was the deputy director of the Office of Security*, also told [Doe] that [his] homosexual activities had violated CIA regulations." Doe Affidavit of August 23, 1982, ¶ 13. He has at no point claimed that either officer or any other CIA employee told him that all homosexual activities, as opposed to *his clandestine and deliberately concealed activity*, were violations of any blanket policy. If this constitutes evidence of a blanket policy at all, it would seem to be evidence within the contemplation of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Supreme Court in that case noted that in the context of summary judgment, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). The single vague paragraph of Doe's affidavit cannot be deemed more than "colorable." Particularly is this so given the period of time Doe has had to accumulate any further evidence to survive the summary judgment motion.

Otherwise viewed, as the Supreme Court instructed us in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986), the nonmoving party "must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 587 (citations omitted) (emphasis in original). As we interpreted that doctrine in *Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558 (D.C. Cir. 1990), once the movant has supported a summary judgment motion by evidence of particular events, the court may properly look to the nonmovant for rebuttal evidence either "from persons familiar with the particular events," or expect the nonmovant to "otherwise cast more than metaphysical doubt on the credibility of the testimony." *Id.* at 1561. Here the movant

CIA has come forward with abundant evidence of the nonexistence of any such blanket policy. The unspecific paragraph in Doe's original affidavit offers no evidence from anyone having knowledge of such a blanket policy that such a policy exists. For him to cast more than metaphysical doubt, he should at least have provided some direct evidence of someone having knowledge of that policy asserting it to exist, especially given the time available to him. Absent that, he has cast no more than "metaphysical doubt." Where the moving party in summary judgment is not the party with the burden of proof,

> the moving party's duty to "support" its motion is discharged by its "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." ... Thus, where the non-moving party shoulders the burden of proof at trial, the movant's burden is met by a sufficient "'showing' ... that there is an absence of evidence to support the nonmoving party's case."

*Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C. Cir. 1988) (quoting *Celotex*, 477 U.S. at 325, and Fed. R. Civ. P. 56(c)). This is the case here. A plaintiff suing for an alleged breach of his constitutional rights has an obvious burden of proving the existence of those facts which make out the breach. Here, Doe has pointed to no evidence to show such a breach. Appellant's bare assertion that the evidence at trial would show such a policy is without effect. Once the moving party has discharged its duty under *Celotex* and Rule 56, then the non-movant, having the burden at trial, needs to respond with a showing of "affirmative evidence." *Frito-Lay,*

*Inc.*, 863 F.2d at 1034 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986)). In *Frito-Lay*, appellant's counsel had asserted to the District Court that he possessed "a whole transcript of sworn testimony in [an] administrative hearing" and that the testimony "create[d] a disputed fact on" the pivotal issue in the case. 863 F.2d at 1036. We rejected appellant's claim, noting that appellant had not introduced the testimony into the District Court's record at summary judgment, and that we could not speculate "on what would have been the result had appellant done so." *Id.* The same reasoning prevails here. Appellant claims to have evidence, but none was presented before the District Court. The District Court therefore rightly concluded on summary judgment that there was no evidentiary support for an issue as to the existence of the blanket policy, and correctly granted summary judgment in favor of the Agency on that point.

Additionally, even if there were an issue as to such a policy, Doe could not recover unless he could establish that his termination resulted from that policy. Again, the record before the courts supports the District Court's conclusion that the "CIA's reason for the discharge was that Doe's homosexual conduct was a threat to national security." *Doe v. Webster*, 769 F. Supp. at 3. In other words, Doe's termination resulted not from a blanket policy but from the CIA's individualized determination that his own case represented a threat to the national security mission of the Agency. The record establishes that the CIA had a legitimate concern about Doe's trustworthiness, in light of the fact that he hid information about his involvement in homosexual activity despite suspecting or knowing that the Agency considered such involvement to be a matter of security significance. Resp. Br. at 4. Doe came forward voluntarily only because of his perception that his financial interests

would be threatened by continued concealment.[3/] Further, Doe's oft-expressed concern for the "privacy" of his partners has led the Agency to conclude that he might well be susceptible to threats of exposure directed against his past, present, or future homosexual partners.

As the CIA put it in one sanitized exhibit in the record, "the Subject has demonstrated that he cannot be trusted by this Agency. For more than five years, even while holding positions which gave him access to sensitive classified information, he did his involvement in homosexual activity although he knew it was a matter of security significance." Doe points to nothing that would suggest that these reasons are pretextual.

We therefore conclude that enough undisputed evidence exists in the record both to support summary judgment for the CIA on the equal protection claim, and to support the District Court's conclusion that "the discharge is rationally related to the legitimate government security interest in collecting foreign intelligence and protecting the nation's secrets." *Doe v. Webster*, 769 F.2d at 3. *See also Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) ("It is not irrational for the [FBI] to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes ... even 'open' homosexuals to the risk of possible blackmail to protect their partners, if not themselves") (punctuation omitted). The District Court properly granted judgment for the CIA.

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[3/] The pecuniary interest referenced in the evidence before the District Court apparently refers to Doe's fear that if his homosexuality were involuntarily discovered, he would be terminated and might lose benefits which he might be in a better position to protect through voluntary disclosure.

## IV.

Section 102(c) of the National Security Act of 1947 places termination decisions solely within the discretion of the Director of the Central Intelligence Agency. In light of this fact, John Doe could have derived no expectation of continued employment from "agency-fostered understandings" that would have vested in him a property right protected under the Fifth Amendment. He likewise has failed to demonstrate any issues of material fact that would allow his equal protection claim to withstand the government's motion for summary judgment. We therefore reverse the District Court's holding with respect to Doe's property claim, and affirm the dismissal of his equal protection claim.

*It is so ordered.*

Edwards, *Circuit Judge*, concurring in part and concurring in the judgment. I concur in the opinion insofar as it disposes of Doe's due process claim. As to Doe's equal protection claim, I concur only in the judgment. I write separately to make clear my view that there is no evidence in the record that reasonably supports a claim that the Central Intelligence Agency ("CIA") has a blanket policy against homosexuals. Doe's equal protection claim should be dismissed on that ground alone. The CIA unequivocally has asserted that it has no such blanket policy, and Government counsel repeated this assertion during oral argument before this court. There is absolutely nothing in the record that plausibly suggests otherwise.

Doe points to no evidence that contradicts the Government's position that the CIA discharged him after an individualized assessment of the circumstances of his case, rather than pursuant to a blanket ban. The record plainly does not support a contention that Doe was dismissed because of the mere fact of his homosexuality. Furthermore, Doe has pointed to nothing in the record that might reasonably be viewed to suggest that he suffered disparate treatment in his disciplinary assessment by virtue of his homosexuality. In short, Doe has asserted nothing that might prompt consideration of an equal protection claim.

Randolph, *Circuit Judge, concurring in part and concurring in the judgment*: I join the court's opinion to the extent it rejects Doe's due process claim. With respect to Doe's equal protection claim, I join only the portion of the opinion holding that Doe's termination resulted "from an individualized determination that his case represented a threat to the national security mission of the agency."

The court's alternative reason for rejecting Doe's equal protection claim — that Doe failed to present any "evidence" showing that the CIA had a blanket policy against homosexuals — is, to my mind, mistaken. The two statements contained in Doe's affidavit — two CIA officials said his homosexuality violated CIA regulations — surely qualify as evidence. Both constitute admissions by a party-opponent. *See* Fed. R. Evid. 801(d)(2). Are the statements evidence of a blanket CIA policy against homosexuals? My colleagues think not. But at the summary judgment state the court must (1) believe the evidence of the nonmoving party; and (2) draw all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The reference to "regulations" in the statements Doe recites should therefore be taken to mean internal policy guidelines. Given the general nature of the remarks of the CIA officials, it is logical to infer that they were aimed at homosexuality itself, not just Doe's activities. This is precisely how Chief Justice Rehnquist in his opinion for the Court in *Webster v. Doe*, 486 U.S. 592, 602 (1988), read Doe's affidavit. The two statements in the affidavit, the Chief Justice wrote, support Doe's claim that a "pervasive discrimination policy exists in the CIA's employment practices regarding *all* homosexuals." 486 U.S. at 602. If the Supreme Court's opinion in this regard is not the law of the case, it is something sufficiently similar to warrant our respect.

The problem here is not that Doe presented "no evidence," but that he may not have presented enough. As the nonmoving party having the burden of proof at trial, Doe

had to counter the CIA's summary judgment motion with sufficient evidence to enable a jury to return a verdict for him. *Anderson*, 477 U.S. at 249. The test is basically the same as that governing motions for directed verdicts or judgments n.o.v. — "if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson*, 477 U.S. at 250-51 (citation omitted). The statements in Doe's affidavit probably fall short, but there may be more to consider. Doe also relied upon evidence reported in *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989). *See* Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, at 21-22 (June 25, 1990). *Dubbs* held that the plaintiff there had presented sufficient evidence to survive summary judgment on her claim that she had been denied a security clearance in 1981 pursuant to a CIA anti-homosexual policy. The court of appeals cited a March 1981 letter to the plaintiff from the Director of Security for the CIA and the "testimony" of a former CIA Security Director.

The events recounted in *Dubbs* took place nearly at the same time as the events in Doe's case. Can Doe rely on the evidence recounted in the *Dubbs* opinion? Rule 56(c), Fed. R. Civ. P., provides that district courts should base their evaluation of material facts claimed to be in dispute on "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." The recitation of evidence in a judicial opinion is not within any of these categories. But courts routinely consider "any material that would be admissible or usable at trial." 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2721, at 40 (2d ed. 1983), and, according to some authorities, courts considering a motion for summary judgment may appropriately take judicial notice of the record of "other cases involving the same subject matter." *Id.*

§ 2723, at 67. If we followed this approach (the issue is unresolved in this circuit), the statements set forth in *Dubbs* would have to be considered. Properly authenticated, these statements would be admissible in Doe's trial on the issue of the existence of a CIA blanket policy. The court of appeals in *Dubbs* held that the statements alone were enough to get to a jury on the blanket policy issue (*see* 866 F.2d at 1119). The *Dubbs* evidence plus the evidence in Doe's affidavit would surely be enough to get the blanket question to the jury in Doe's case, assuming — as I do, but only *arguendo* — that discrimination on the basis of homosexuality violates the Constitution.

But these questions regarding the sufficiency of Doe's affidavit and what material may be taken into account on motions for summary judgment (and the constitutionality of the alleged CIA policy) are unnecessary to decide in this case. As the majority opinion holds, Doe was fired, not because of any blanket CIA policy, but for decidedly individualized reasons. That disposes of his equal protection claim. I would rest the judgment on that alone.

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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| JOHN DOE, | : | **FILED JUL 3, 1991** |
| Plaintiff | : | |
| v. | : | CIVIL ACTION NO. 82-2016 |
| WILLIAM H. WEBSTER, Director, Central Intelligence Agency, | : | |
| Defendant | : | |

**JUDGMENT**

In accordance with Defendant's Motion for Entry of Judgment and Memorandum of Support thereof under Rule 58, Federal Rules of Civil Procedure and the entire record herein, the Court has determined that the issues presented are conclusively treated in the Opinion and Order of June 4, 1991, it is by the Court this 2nd day of July, 1991,

**ORDERED AND ADJUDGED,** that Plaintiff's Motion for Summary Judgment is Granted and Defendant's Motion for Summary Judgment is Denied, and Judgement is hereby entered for Plaintiff.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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| JOHN DOE, | : | **FILED JUN 4, 1991** |
| Plaintiff | : | |
| v. | | CIVIL ACTION NO. |
| | : | 82-2016 |
| WILLIAM H. WEBSTER, Director, Central Intelligence Agency, | : | |
| | : | |
| Defendant | | |
| | : | |

## MEMORANDUM AND ORDER

This case was remanded from the United States Supreme Court. At issue is whether plaintiff, John Doe, has a colorable constitutional claim arising out of his discharge from the Central Intelligence Agency.

## I. BACKGROUND

John Doe began employment with the Central Intelligence Agency (hereinafter "CIA") in 1973 as a clerk-typist. His evaluations consistently rated him outstanding or excellent. By 1977, Doe had been promoted to a covert electronics technician.

In January 1982, Doe voluntarily informed a CIA security officer that he was a homosexual. Shortly thereafter, the CIA placed him on paid administrative leave and conducted an investigation concerning the security implications of his homosexual conduct. During the

investigation, which involved several interviews and a polygraph test, Doe admitted engaging in homosexual conduct, but denied ever having relations with any foreign national or having disclosed classified information to any sexual partner. Doe was shown the report of the interviews and the test, and he submitted a two-page statement to the Agency commenting on the report.

On April 14, 1982, Doe was informed by the Agency's Office of Security that his homosexuality posed a threat to security, and he was asked to resign. When he refused to do so, the Office of Security recommended to the Director of the CIA that he be dismissed. He was dismissed by the Director's order on May 7, 1982. Doe was advised that the CIA would give him a positive recommendation in any future job search, but if he applied for a job requiring a security clearance, the Agency would inform the prospective employer that it had concluded that his homosexuality presented a security threat.

## II. CONSTITUTIONAL CLAIMS

Doe has three unresolved constitutional claims: (a) he claims that he has an equal protection claim; (b) he claims that he has a right to privacy; and (c) he claims that he has a due process property interest in employment.

### A. Equal Protection Claim

Doe does not have a colorable equal protection claim if the Court finds a rational basis for the termination of his employment. It is widely held that the appropriate level of equal protection constitutional analysis to be employed in cases involving homosexuals is "rational basis" analysis. *See Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990). In those cases, both Courts rejected attempts by the plaintiffs to gain heightened constitutional protections for homosexuals as a suspect or

quasi-suspect class. Therefore, the appropriate standard which applies to Doe is not that of "strict scrutiny," but rather "rational basis." If an action or policy is based on a suspect classification such as race, alienage, or national origin, that is when the strict scrutiny standard is applied.[4/] When the strict scrutiny standard is applied, the classification will be sustained only if it is suitably tailored to serve a compelling government interest.

Secondly, classifications which are based on illegitimacy or gender are subject to a "quasi-suspect" classification. There is an intermediate level of judicial scrutiny applied. It will only be upheld if the classification is "substantially related to an important governmental interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

If the classification falls into neither category of suspect nor quasi-suspect class, the rational basis standard is used. The issue then is whether the CIA's decision to terminate Doe's employment, based on his homosexual conduct is rationally related to the CIA's national security responsibilities. If so, the action is presumed to be valid and will be sustained.

Here, the CIA's reason for the discharge was that Doe's homosexual conduct was a threat to national security. Doe must conceded that the CIA, as the primary agency responsible for collecting foreign intelligence and protecting the secrecy of information important to our national security, has a legitimate interest in ensuring that its employees are not susceptible to breaches of security.

In *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), the Court of Appeals recognized that the specialized functions of

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[4/] See Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); and Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin).

the Federal Bureau of Investigation, including "counter-intelligence duties that involve highly classified matters relating to national security," rationally justified consideration of homosexual conduct that could adversely affect the FBI's responsibilities. 822 F.2d at 104. The rationale that homosexuals may be subject to blackmail and coercion has been recognized in many opinions. See *Padula*, 822 F.2d at 104 (it is not irrational for the [FBI] to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even "open" homosexuals, to the risk of possible blackmail to protect their partners, if not themselves."); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 578 n.13 (9th Cir. 1990) ("We conclude that the targeting of homosexuals by hostile intelligence agencies is a legitimate if not compelling justification.").

As a result, it is evident that the discharge is rationally related to the legitimate government security interest in collecting foreign intelligence and protecting the nation's secrets. Clearly, the CIA has a responsibility to ensure that its employees are not subject to threats and coercion. Homosexuals engaging in homosexual conduct pose a greater security risk than heterosexuals. Doe may be particularly susceptible to blackmail and coercion by hostile intelligence agents to protect himself or his partners even if he has admitted his homosexuality to friends and family. The fact is that homosexual conduct is a characteristic that hostile intelligence services are likely to target, and at least some homosexuals may be coerced or manipulated.

Doe asserts that because heterosexuals may also be subjects of hostile intelligence coercion, it is irrational to assume that homosexuals are more likely that heterosexuals to pose a security risk. However, in *High Tech Gays*, the Court recognized that foreign services do in fact target homosexuals for possible exploitation. The CIA should not be required to

ignore homosexual conduct when assessing the risk of that conduct on their employees. Thus, the termination of CIA employment, based on admitted homosexual conduct, is rationally related to the Agency's national security concerns. Therefore, Doe does not have a colorable equal protection claim.

**B. Right to Privacy Claim**

Doe does not further pursue a right to privacy claim.

**C. Due Process**

**1. Substantive Due Process — Property Interest**

Doe has a protected property interest in employment at the CIA. A property interest in employment arises when derived from a "reasonable expectation of it," and there must be "a legitimate claim of entitlement." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Such an entitlement is derived from laws or rules governing the state which secures benefits of employment.

Here, there are three sources which govern Doe's employment. They are the statute — section 102(c) of the National Security Act, 50 U.S.C. § 403(c), CIA regulations, and the agency policy statements and understandings. If Doe derives a property interest from any of the sources, then his employment cannot be taken away without the minimal procedural due process protections he seeks.

**(A.) Section 102(c) of the National Security Act**

The language of section 102(c) allows termination of CIA personnel in the Director's "discretion ... notwithstanding the provisions of section 7501 of Title 5 or the provisions of any other law ... whenever he shall deem such termination necessary or advisable in the interests of the United States."

The intent of the statute is that employees of the CIA should serve at the pleasure of the Director. CIA employees remain employed at the will of the Director of the agency. The CIA's security purposes warrant extreme carefulness, and the Supreme Court has noted that "employment with the CIA entails a high degree of trust that is perhaps unmatched in government service." *Webster v. Doe*, 486 U.S. at 601.

However, the statute provides an objective standard: "necessary or advisable in the interests of the United States." Doe argues that the termination must meet that standard, and that creates a property interest in continued employment which is protected by the due process clause.

His argument fails because the standard is not an objective one, but rather a subjective one. The Director determines what is necessary or advisable for the United States interests. Here, the Director determined that Doe's homosexual behavior posed a security threat and was a danger to the those interests. Clearly, the language of section 102 and Doe's assertion are inconsistent. If the statute provides the Director with such a great degree of deference, then it cannot supply a reasonable expectation of a property interest in continued employment.

**(B.) CIA Regulations**

Doe asserts that CIA Headquarters Regulations 20-27 provides that non-probationary employees will be terminated only for specific job-related reasons:

(1) failure to meet the work and efficiency standards of the Agency;

(2) failure to meet the security or medical standards;

(3) failure to meet standards of conduct set forth in HR 20-6 (concerning conflicts of interest, acceptance of gifts, and participation in riots and civil disturbances);

(4) abandonment of position;

(5) legal incompetence;

(6) an excess of personnel;

(7) low ratings in performance and potential; or

(8) a determination by the Director of Central Intelligence that termination is necessary and advisable in the interests of the Agency or for other reasons contributing to the efficiency of the Agency. HR 20-27 (c)-(j).

He argues that the list indicates that there is an expectation that employees will be terminated only for one of the enumerated reasons and that provides a property interest in continued employment.

However, his argument is incorrect on two accounts. First, the reason for his termination falls into categories (2) and (8). The catchall provision of (8) encompasses an appropriate reason for termination even if (2) is arguably inapposite. Secondly, the Court of Appeals specifically rejected the conclusion that CIA regulation 20-27 provides procedural protections. It found that "the CIA regulation [HR 20-27] provides no independent source of procedural or substantive protections." *Doe v. Casey*, 796 F.2d at 1520. Since those protections are not derived from the regulation, it cannot be a source of entitlement.

## (C.) Agency-Fostered Understandings

In *Perry v. Sinderman*, 408 U.S. 593 (1972), plaintiff was employed as a professor for ten years in a state college system, the last four of which were under one year contracts. When he was not retained for the following year, respondents alleged that a "de facto tenure policy" existed. The Supreme Court agreed and said that the professor was entitled to a hearing to be informed of reasons for his nonretention. The "understandings" created by the college gave him a property interest in continued employment.

Doe argues that a CIA booklet prepared to familiarize employees and applicants with Agency policies states that "the Agency has the authority to separate involuntarily any employee who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively." He claims that this too creates a property interest in continued employment.

Further, plaintiff claims that CIA officials told him at the outset of his employment that once his probationary period was completed, he would continue to be employed as long as his services were needed, his work was well done, he complied with security regulations, and protected classified information from unauthorized disclosure.

Finally, he argues that the Agency's information booklet contains assurances that the Agency does not concern itself with employees' private lives provided that they do not interfere with their ability to perform their jobs. It states that "Except for the continuing responsibility to avoid disclosure of information affecting national security, Agency employees are under no formal restrictions beyond those governing the conduct of Federal workers as a whole."

These Agency-fostered understandings create a property interest for Doe in his employment. Under *Roth*, it is only

necessary to show one source of entitlement to create a property interest in continued employment. Consequently, in light of the arguments above, Doe has demonstrated that he has a protectable property interest in continued employment with the CIA which entitle him to due process protection.

**2. Procedural Due Process**

In *Ashton v. Civiletti*, 613 F.2d 923 (1979), the Court found that a mailroom clerk for the FBI who was a homosexual had a "legitimate expectation of employment" because the FBI rules and regulations said that employees should not be terminated except for a reason related to job performance. As a result, he had a property interest in employment and was entitled to due process protections.

Since it has been established that Doe has a protectable property interest in his employment with the CIA, he can only be fired after receiving the procedural protections of the Due Process Clause. Doe was terminated from the CIA on the basis of a statement that the circumstances of his homosexuality presented a security threat. He was not given the reasons for this determination nor did he have an opportunity to respond. At a minimum, Doe is entitled to notice and a hearing so that he may rebut the allegations. Doe's property interest was violated and he is entitled to fair procedures.

**III. SUMMARY JUDGMENT**

Pending for determination are cross-motions for summary judgment. Defendant's motion for summary judgment must be denied. Plaintiff has successfully demonstrated that there is a "genuine issue of material fact" which exists.

Plaintiff asserts that a blanket "policy" exists which bars homosexuals who engage in homosexual activity from

employment with the CIA. He says that when he voluntarily informed the CIA of his homosexuality, a security officer told him that his homosexual activities violated CIA regulations. Four days later, another CIA official, who Doe believed to the Deputy Director of the Office of Security, told him the same thing. Based on these statements, Doe asserts that his termination was a foregone conclusion rather than the result of individualized consideration of his homosexual activity.

In conclusion, Doe has substantiated his claim that he is entitled to substantive and procedural due process. As a result, his cross-motion for summary judgment must be granted and the defendant's motion for summary judgment must be denied.

An appropriate order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: June 4, 1991

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| JOHN DOE, | : | **FILED JUN 4, 1991** |
| Plaintiff | : | |
| v. | : | CIVIL ACTION NO. 82-2016 |
| WILLIAM H. WEBSTER, | : | |
| Defendant | : | |

**ORDER**

Upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motions for Summary Judgment, it is by the Court this 4th day of June, 1991,

**ORDERED,** that Defendant's Motion for Summary Judgment is **DENIED**; and its is

**FURTHER ORDERED**, that Plaintiff's Cross-Motion for Summary Judgment is **GRANTED.**

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN DOE,

Plaintiff,

v.

WILLIAM H. WEBSTER, Director of Central Intelligence,

Defendant.

**FILED JUN 6, 1990**

Civil Action No. 82-2016-AER

## ORDER

Defendant has moved to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6). The Court held the motion in abeyance pending discovery in this matter in accordance with the holdings of the courts above. Discovery is now complete. Defendant continues to press his motion; Plaintiff resists, arguing that the case should be decided on motion for summary judgment.

In resolving a discovery dispute, the Court had occasion to review at least some of the evidence relating to Plaintiff's termination. It is appropriate to address Defendant's claim, in reliance on that evidence, that no genuine issue of material fact remains. The Court will treat Defendant's Motion as one for summary judgment. *See* Fed. R. Civ. Pro. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss . . ., matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all

parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56"). Plaintiff will respond to it accordingly. Therefore, it is by the Court this 5th day of June, 1990,

**ORDERED,** that no later than June 20, 1990, Plaintiff shall file his response to Defendant's motion. Such response shall including a memorandum of points and authorities in opposition to Defendant's legal arguments, as well as all evidentiary material he deems sufficient to establish a genuine issue of material fact; and it is

**FURTHER ORDERED,** that no later than July 2, 1990, Defendant shall file a reply. Such reply shall include all additional materials in support of summary judgment.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN DOE,

Plaintiff,

v.

WILLIAM H. WEBSTER, Director of Central Intelligence,

Defendant.

**FILED MAY 10, 1990**

Civil Action No. 82-2016-AER

**ORDER**

Upon consideration of Plaintiff's Motion to Compel Discovery, the Opposition thereto, and following *in camera* review of the Intra-Agency Memorandum from the CIA Office of Security, dated March 31, 1982, it appears that Plaintiff's intended discovery is not "relevant to the subject matter involved in the pending action," Fed. R. Civ. Pro. 26(b)(1). Therefore, it is by the Court this 9th day of May, 1990,

**ORDERED**, that Plaintiff's Motion be and hereby is **DENIED**; and it is

**FURTHER ORDERED**, that Plaintiff shall respond to Defendant's Motion to Dismiss no later than Friday, May 25, 1990, with any Reply by Defendant to follow no later than Friday, June 1, 1990.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN DOE,

Plaintiff,

v

WILLIAM H. WEBSTER, Director of Central Intelligence,

Defendant.

**FILED APR 18, 1990**

Civil Action No. 82-2016-AER

## ORDER

Now before the Court is Plaintiff's Motion to Compel Discovery. Plaintiff seeks information about Defendant's policies and statistics relating to the employment of homosexuals. Defendant resists on the ground that such information falls outside the scope of discovery contemplated by the reviewing courts and this Court on remand — the reason(s) for Doe's termination in 1982.

Defendant has offered two documents: one of these is a statement by William Casey, then-Director, terminating Doe pursuant to section 102(c) of the National Security Act of 1947. The statement gives no reasons for the termination. The second document offered is an excerpt, the sixth and final paragraph, from a memorandum about Doe presented to Casey prior to the termination. Defendant provided this "although [it is] not required by this Court's discovery orders."

The issue presented by Doe's motion is whether CIA policies on homosexual employees are relevant. They would not be absent credible proof that, in firing Doe, Director Casey relied in some way on a policy, as opposed to Doe's individual conduct. The Agency submits that Casey relied on the memorandum in ending Doe's employment. The entirety of the memorandum, however, has not been provided to the Court to facilitate a relevancy determination. Therefore, it is by the Court this 17th day of April, 1990

**ORDERED**, that no later than Monday, April 30, 1990, Defendant shall file with the Court, *in camera* and on an *ex parte* basis, an unredacted version of the Intra-Agency Memorandum from the CIA Office of Security, dated March 31, 1982, recommending Doe's termination. In the event that the document contains information Defendant deems classified, Defendant shall file it through the Court Security Officer.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN DOE,

Plaintiff

v.

WILLIAM H. WEBSTER, Director of Central Intelligence,

Defendant

**FILED DEC 8, 1989**

Civil Action No. 82-2016-AER

## MEMORANDUM AND ORDER

Defendant in this matter, the Director of the Central Intelligence Agency, moves that the Court reconsider and vacate the Order in this matter of November 17, 1989. The Order permits Plaintiff additional time to respond to Defendant's motion to dismiss pending completion of discovery to determine Defendant's reasons for terminating him. Because the Court believes that this discovery is compelled by the decisions of the Supreme Court and the Court of Appeals, Defendant's motion for reconsideration shall be denied.

The essence of Defendant's argument for vacation of the Order is that regardless of the results of Plaintiff's discovery, his constitutional claims cannot possibly succeed under the law of this Circuit. Put another way, Defendant would have the Court decide its motion to dismiss for failure to state a claim *prior* to any discovery by Plaintiff. The opinions of the

Supreme Court and Court of Appeals require a somewhat different course.

In *Webster v. Doe*, 108 S. Ct. 2047 (1988), the Supreme Court first held that judicial review of a termination decision under section 102(c) of the National Security Act is precluded, since the section commits that decision entirely to the discretion of the Director. *Id.* at 2053. The Court went on, however, to hold that Doe's *constitutional* claims were entitled to judicial consideration. In doing so, the Court made the following observation:

> We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims. it is difficult, if not impossible to ascertain from the amended complaint whether respondent contends that his termination, based on *his* homosexuality, is constitutionally impermissible, or whether he asserts that a more pervasive discrimination policy exists in the CIA's employment practices regarding *all* homosexuals. This ambiguity in the amended complaint is no doubt attributable in part to the inconsistent explanations [Doe] received from the Agency itself regarding his termination. Prior to discharge, [Doe] had been told by two CIA security officers that his homosexual activities themselves violated CIA regulations. In contrast, the Deputy General Counsel of the CIA later informed [Doe] that homosexuality was merely a security concern that did not inevitably result in termination, but instead was evaluated on a case-by-case basis.

*Id.* at 2053.

It is quite clear that whether or not Doe has a "colorable constitutional claim" turns on the reason for his dismissal. The Supreme Court recognized that the CIA has offered differing statements in this regard. The Court of Appeals

mandate to this Court following the Supreme Court remand provides for "consideration of colorable constitutional claims arising out of the actions of the Director." Strictly speaking, this Court lacks basis to determine exactly what "the actions of the Director" were. Nor can Doe properly frame a constitution claim for the Court to consider until apprised of the reason for his termination.

Defendant argues that "[u]nder the authority of *Bowers v. Hardwick*, [478 U.S. 186 (1986)], *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) and *Dronenberg v. Zech*, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984), *reh'g en banc denied*, 746 F.2d 1379 (1984), that argument that Doe's homosexual conduct is constitutionally protected for equal protection or due process purposes has been flatly rejected." In *Bowers*, the Supreme Court held that the due process clause of the fourteenth amendment did not provide for any substantive privacy right to engage in consensual sodomy. *Padula* found that the Federal Bureau of Investigation had asserted a rational basis under the equal protection clause for failing to hire a homosexual — that the F.B.I.'s "specialized functions" rationally justified a concern that an agent's homosexual conduct could adversely affect the agency's responsibilities. Similarly, *Dronenberg* held that a Navy policy of discharging active homosexuals was rationally related to the maintenance of morale and discipline within the service.

While helpful, these cases do not decide Doe's constitutional claims. As the Court of Appeals pointed out, if Doe was terminated because of a general policy barring all homosexuals, which was unclear on the record, "there is an arguable claim that can be litigated." *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986). That claim would raise "the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*." *Id.* (emphasis in original). This potential claim is quite distinct from the claims tendered in the cases above, where homosexual *conduct* was at issue.

Doe is entitled to have his constitutional claims heard based on the circumstances *his* case presents, and he is entitled to discover precisely what those circumstances are.

Moreover, it should be noted that the Supreme Court, and indeed the Agency itself, recognized that some discovery would occur were Plaintiff entitled to pursue constitutional claims. The Agency clearly appreciated this consequence when it argued that in order to make out his claim, Plaintiff would envitably be "'rummaging around' in the Agency's affairs to the detriment of national security." *Webster v. Doe*, 108 S. Ct. at 2054. In rejecting this argument, the Court concluded that not only did other discrimination suits against the Agency require discovery, but that the District Court could always exercise control over the discovery process "so as to balance [Doe's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission. *Id.* (citations omitted).

Despite Defendant's arguments to the contrary, the Court remains convinced that the decisions of the Supreme Court and Court of Appeals require discovery on a rather limited issue: why did the Director of Central Intelligence order Doe's termination? The discovery is an essential step in this Court's consideration of the existence and validity of colorable constitutional claims arising out of the Director's action. Therefore, in accordance with this Memorandum it is by the Court this 7th day of December, 1989,

**ORDERED**, that Defendant's Motion for Reconsideration be and hereby is **DENIED**.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN DOE,

Plaintiff

v.

WILLIAM H. WEBSTER,
Director of Central
Intelligence,

Defendant

**FILED NOV 17, 1989**

Civil Action No. 82-2016-AER

## ORDER

Both the Supreme Court and the Court of Appeals have ordered further proceedings in this Court to determine certain factual questions, *viz.*, the precise reasons why Defendant terminated Plaintiff in 1982. Therefore, upon consideration of such mandate and Plaintiff's Motion to Defer His Response to Defendant's Motion to Dismiss, it is by the Court this 16th day of November, 1989,

**ORDERED**, that Plaintiff's Motion be and hereby is **GRANTED**; and it is

**FURTHER ORDERED**, that the parties shall complete discovery on the above issue no later than January 15, 1990 and Plaintiff shall respond to Defendant's Motion to dismiss within 10 days thereafter; and it is

**FURTHER ORDERED**, that the parties shall suggest by written submission, no later than February 1, 1990, the most efficacious procedure by which the Court can make the required factual determination.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

(2)

FILED

SEP 14 1993

OFFICE OF THE CLERK

No. 92-2025

# In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN DOE, PETITIONER

*v.*

R. JAMES WOOLSEY, DIRECTOR OF CENTRAL INTELLIGENCE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

1. Whether a Central Intelligence Agency employee has a property entitlement, protected by the Fifth Amendment, to continued employment with the CIA.

2. Whether the CIA's individualized consideration of security concerns raised by petitioner's conduct violated his right to equal protection under the Due Process Clause of the Fifth Amendment.

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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No. 92-2025

JOHN DOE, PETITIONER

*v.*

R. JAMES WOOLSEY, DIRECTOR OF CENTRAL INTELLIGENCE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-26a) is reported at 981 F.2d 1316. The opinion of the district court (Pet. App. 28a-47a) is reported at 769 F. Supp. 1.

### JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. A petition for rehearing was denied on March 23, 1993. Pet. App. 7a. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATEMENT

1. The Central Intelligence Agency (CIA) hired petitioner as a clerk-typist in 1973, and in 1980 promoted him to an undercover position.[1] Pet. App. 9a. In 1982, the Director of Central Intelligence discharged petitioner from employment with the CIA, deeming the termination "necessary and advisable in the interests of the United States" pursuant to Section 102(c) of the National Security Act." C.A. App. 104. Section 102(c), 50 U.S.C. 403(c), provides:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government * * *.

2. Petitioner brought this action against the Director of Central Intelligence in district court, seeking injunctive and declaratory relief. Petitioner alleged that his dismissal was prompted by his admission that he is a homosexual, and violated the Administrative Procedure Act, 5 U.S.C. 706, because the decision to fire him was arbitrary, capricious, and

[1] Petitioner has proceeded in this case under the pseudonym "John Doe" because his status as an undercover CIA employee cannot be publicly acknowledged. See C.A. App. 47; *Doe* v. *Casey*, 796 F.2d 1508, 1512 n.2 (D.C. Cir. 1986), aff'd in part and rev'd in part *sub nom. Webster* v. *Doe*, 486 U.S. 592 (1988).

an abuse of discretion, and was reached without adhering to procedures required by law and by CIA regulations. In addition, petitioner contended that his termination denied him equal protection of the laws and deprived him, without due process, of a property interest in continued employment with the CIA. Pet. App. 9a-10a.

Without reaching petitioner's constitutional claims, the district court held that the CIA violated petitioner's rights by dismissing him without following the procedures afforded by CIA regulations. *Doe* v. *Casey*, 601 F. Supp. 581 (D.D.C. 1985). The court ordered the CIA to reinstate petitioner to administrative leave, with pay, until he was terminated in accordance with procedures set forth in CIA regulations.[2] *Id.* at 586-590.

On petitioner's first appeal, the court of appeals reversed the district court's determination that petitioner's discharge violated CIA regulations. *Doe* v. *Casey*, 796 F.2d 1508, 1519-1520 (D.C. Cir. 1986). The court held that the regulations permitted the Director to fire a CIA employee under Section 102(c) without any process whatsoever. The court rejected, however, the government's contention that Section 102(c) completely precluded judicial review of petitioner's termination. 796 F.2d at 1513-1519. Because the termination did not violate the CIA regulations, the court explained that petitioner "must look to section 102(c) itself or to the Constitution" to support his claims. 796 F.2d at 1520. In particular, the court held that if the Director had invoked Section 102(c) because the CIA had a blanket policy against employ-

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[2] Petitioner has remained on paid leave from 1985 to the present pursuant to the district court's order.

ing homosexuals, the Agency would have to justify why such a policy was "necessary or advisable in the interests of the United States." *Id.* at 1522.

This Court granted the government's petition for a writ of certiorari and reversed the court of appeals' ruling that a court could review whether a termination ordered by the Director under Section 102(c) was in fact "necessary or advisable in the interests of the United States." *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988). The Court explained that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion," 486 U.S. at 601, and that such decisions are thus "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and are not reviewable under the APA. The Court also held, however, that Section 102(c) does not preclude a court from reviewing a "colorable constitutional claim" arising out of a Section 102(c) dismissal, and remanded the case for further proceedings on petitioner's constitutional claims. 486 U.S. at 604-605.

3. a. On remand, the district court held that petitioner did not have a colorable equal protection claim because the Director's actions were rationally related to legitimate governmental interests. Pet. App. 29a-32a. During discovery, the CIA submitted a redacted section of a memorandum from the Agency's Office of Security that recommended petitioner's discharge (C.A. App. 103), as well as then-Director William Casey's subsequent finding that the termination was necessary and advisable in the interests of the United States (*id.* at 104). The memorandum explained that petitioner had intentionally hidden his homosexual activity from the Agency for more than five years, although he knew that it was a significant

security concern; that he had demonstrated a "pronounced reluctance" to reveal information about his past conduct, and in particular information regarding his sexual partners, and therefore "might be susceptible to threats of exposure directed toward his past, present or future partners who are not open about their homosexual activities"; and that his activities threatened to draw attention to the sensitive CIA cover facility where he was employed in an undercover capacity. *Id.* at 103. On the basis of these facts, the Office of Security concluded that petitioner "[could] not be trusted" and posed an "unacceptable and unnecessary" security risk to the Agency. *Ibid.* After examining the record, the district court agreed that petitioner's termination was based on the fact that the CIA considered his conduct to be a threat to national security. Pet. App. 30a. The court concluded that termination based on security concerns related to petitioner's homosexual conduct did not violate his equal protection rights. *Id.* at 30a-32a.

The district court also held, however, that petitioner had a property interest, protected by the Due Process Clause of the Fifth Amendment, in continued employment with the CIA. The court conceded that petitioner had no entitlement to continued employment under either Section 102(c) or the Agency's regulations. Pet. App. 33a-34a. Instead, the court found that petitioner had a cognizable property interest in continued employment based on "[a]gency-fostered understandings."[3] *Id.* at 35a. The court held

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[3] As the court of appeals noted, Pet. App. 11a-12a, the district court based its holding on two sources for such "understandings." First, it pointed to statements in a CIA

that these "understandings" created a property interest in continued employment, and that the Agency could not deprive petitioner of that interest without affording him at least notice and a hearing at which he would have a chance to rebut the allegation that he posed a security threat to the Agency. *Id.* at 35a-36a.

b. The court of appeals reversed the district court's ruling that petitioner had a property interest in his CIA employment. The court held that a CIA employee can have no such interest in light of the Director's authority under Section 102(c) to discharge any Agency employee in his discretion. Pet. App. 13a-14a. The court explained that "[t]he law is clear that if a statute relegates termination to the discretion of the Director, no property entitlement exists." *Id.* at 14a.

The court of appeals also affirmed the district court's rejection of petitioner's equal protection claim, holding that the record before the district court "supports the conclusion that the agency is entitled to summary judgment" on that claim. Pet.

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booklet for incoming personnel that the Agency has the authority to discharge any employee "who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively," and that "[e]xcept for the continuing responsibility to avoid disclosure of information affecting national security, Agency employees are under no formal restrictions beyond those governing the conduct of Federal workers as a whole." *Id.* at 35a; see C.A. App. 29. Second, the court relied on petitioner's affidavit stating that at the beginning of his employment, unidentified CIA officials told him (as summarized by the court) "that once his probationary period was completed, he would continue to be employed as long as his services were needed, his work was well done, he complied with security regulations, and protected classified information from unauthorized disclosure." Pet. App. 35a; see C.A. App. 13.

App. 17a. Assuming, without deciding, that a blanket policy against homosexuals might support an equal protection claim, the court held that petitioner had not pointed to sufficient evidence to raise a genuine issue of material fact as to the existence of any such policy. *Id.* at 17a-18a.

In addition, the court concluded that even if there were an issue as to the existence of a blanket policy, the record in this case established that "Doe's termination resulted not from a blanket policy but from the CIA's individualized determination that his own case represented a threat to the national security mission of the Agency." Pet. App. 20a. Noting that petitioner had "point[ed] to nothing that would suggest" that the reasons for discharge set forth in the CIA's memorandum were pretextual, the court held that "enough undisputed evidence exists in the record both to support summary judgment for the CIA on the equal protection claim, and to support the District Court's conclusion that 'the discharge [was] rationally related to the legitimate government security interest in collecting foreign intelligence and protecting the nation's secrets.'" *Id.* at 21a, quoting *id.* at 31a.[4]

[4] Judge Edwards filed a separate opinion concurring in the court's due process ruling and concurring in the judgment on the equal protection claim. Pet. App. 23a. He wrote separately to make clear his view that the equal protection claim should have been dismissed because there was "absolutely nothing in the record that plausibly suggests" the existence of a "blanket [CIA] policy against homosexuals," and because petitioner had "pointed to nothing in the record that might reasonably be viewed to suggest that he suffered disparate treatment in his disciplinary assessment by virtue of his homosexuality." *Ibid.*

## ARGUMENT

1. Petitioner renews in this Court (Pet. 14-18) his original contention that the language of Section 102(c) itself gives him an expectation of continued employment with the CIA that is protected as a property interest under the Fifth Amendment. As all the courts to consider this case—including this Court—have now held, however, Section 102(c) has precisely the opposite effect.

The district court correctly held that Section 102(c) confers no property right to continued employment because the "[t]he intent of the statute is that employees of the CIA should serve at the pleasure of the Director." Pet. App. 33a. The court of appeals likewise held that because Section 102(c) commits employee terminations to the discretion of the Director, "no property entitlement exists," any statements by Agency employees or other "agency fostered understandings" to the contrary notwithstanding.[5] Pet. App. 13a-14a.

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Judge Randolph also joined the court's opinion on the due process claim but filed a separate opinion (Pet. App. 24a-26a) in which he expressed the view that rejection of petitioner's equal protection claim should rest solely on the ground that "Doe was fired, not because of any blanket CIA policy, but for decidedly individualized reasons." *Id.* at 26a.

[5] Petitioner mounts no separate challenge to the court of appeals' conclusion that "agency fostered understandings" could not give rise to a due process claim if Section 102(c) itself creates no protectable property interest in continued employment. Pet. App. 13a-14a; see Pet. 15. That conclusion is plainly correct. As the court of appeals recognized, Pet. App. 13a-14a, the principle that mutual understandings may create such an interest is "subject to the unquestioned exception" that no such understanding "can contravene the intent of the legislature

Most important, recognition of any property right would be inconsistent with this Court's square holding, in its previous consideration of this case, that Section 102(c) commits decisions to terminate an employee "in the interests of the United States" to the Director's largely unreviewable discretion. *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988). In its prior decision, this Court ruled that Section 102(c) does *not* furnish an objective standard for when a CIA employee may be discharged. 486 U.S. at 600. The Court noted that Section 102(c) allows termination "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States' (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests," *ibid.*, and explained that because this statutory standard "exudes deference to the Director," it forecloses any meaningful judicial review of the termination decision under the APA. *Ibid.* The Court thus concluded that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion." 486 U.S. at 601. As the court of appeals recognized, Pet. App. 13a-14a, that conclusion forecloses petitioner's argument (Pet. 17-18) that Section 102(c)

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regarding the employment entitlements that can be conferred." *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). Thus, "mutual understandings and customs [can] not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes." Pet. App. 14a (quoting *Baden* v. *Koch*, 638 F.2d 486, 492 (2d Cir. 1980)). See also, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 345 n.8 (1976) (fact that employee held position at will and pleasure of city "necessarily establishes that he had *no* property interest" in continued employment).

establishes an "objective standard" for termination sufficient to create a protectable expectation of continued employment.

Petitioner contends (Pet. 15-18) that a construction of Section 102(c) that precludes recognition of a property right in continued CIA employment conflicts with this Court's decisions in *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). Petitioner points out that in *Service* this Court held that the Secretary of State was bound to follow his own regulations in reaching employment decisions, despite a governing statute similar in its terms to Section 102(c), and he argues that that holding would have been erroneous if the statutory language had created a fully discretionary employment regime.[6] With respect to *Arnett*, petitioner argues (Pet. 16-17) that Section 102(c) is no more vague or general than the statutory command at issue there that civil servants be terminated "only for such cause as will promote the efficiency of the [civil] service," 5 U.S.C. 7501(a) (1976), which the opinions in *Arnett* agreed created some protectable property

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[6] The decision in *Service* was based in part on the Court's observation that "[a]lthough Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, * * * it continued to re-enact the [governing statute] without change for several succeeding years." 354 U.S. at 380. There is, of course, no similar consideration in this case. Moreover, petitioner properly refrains from renewing any argument based on the CIA's own regulations. As the court of appeals held in its previous opinion in this case, those regulations fully preserve the discretion conferred on the Director under Section 102(c). *Doe* v. *Casey*, 796 F.2d at 1519-1520; see also *Webster* v. *Doe*, 486 U.S. at 602 n.7.

interest in federal employment. See 416 U.S. at 151-152, 166.

These arguments cannot be reconciled with this Court's previous decision in this case. Petitioner attempts (Pet. 17-18) to distinguish that decision on the ground that "[t]he question whether a statute provides an objective standard to guide the exercise of agency discretion is distinct from the question whether the exercise of that discretion is committed by law to the agency such that review under the APA is unavailable." If so, however, the distinction is one without a meaningful difference. The argument that the Agency's statutory discretion could be sufficiently bounded to create a property right of constitutional significance, but at the same time so unbounded as to provide "no basis on which a reviewing court could properly assess an Agency termination decision," 486 U.S. at 600, is singularly unpersuasive.

2. a. Petitioner contends (Pet. 19) that a "blanket ban on homosexuals" in the CIA would violate equal protection principles. But the court of appeals assumed, for purposes of its decision, that such a policy would offend the Constitution, and held that the district court had nonetheless properly granted summary judgment because the record was wholly devoid of evidence that any such policy existed or was ever applied to petitioner. Pet. App. 17a-18a, 20a; *id.* at 23a (Edwards, J.); *id.* at 26a (Randolph, J.). The CIA has not attempted to justify any general policy against homosexual employees, for the simple reason that it has no such policy; to the contrary, as the court of appeals held, the Agency "has come forward with abundant evidence of the nonexistence of any such blanket policy." *Id.* at 19a. In addition, as the

court of appeals unanimously concluded, the record in this case demonstrates conclusively that petitioner was fired not because of any general policy, but based on the individualized security concerns raised by his specific conduct. *Id.* at 20a-21a, 23a, 26a. Petitioner's attempt to engage the courts in constitutional review of non-existent policies that bear no relation to the facts of his case was correctly rejected by the courts below, and it does not warrant review by this Court.

b. Petitioner argues (Pet. 20-22) that even if his termination was based on an individualized review of his case, that review was constitutionally improper. Although petitioner posits "numerous questions of disparate treatment" (Pet. 21-22), those questions are entirely speculative; he does not and cannot cite any support for them in the record of this case. What the record does document is the Agency's thorough review of legitimate security concerns involving petitioner's individual conduct.[7]

The memorandum prepared by the Agency's Office of Security concluded that petitioner's concern for the privacy of his sexual partners might make him susceptible to threats of exposure directed not toward him, but toward them; that petitioner's involvement in homosexual activity might lead to undesired publicity

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[7] Petitioner's constitutional claims were considered on remand pursuant to this Court's decision in *Webster* v. *Doe*, 486 U.S. at 603-605, that such claims are generally subject to judicial review even in cases arising under Section 102(c). We note that where, as here, a termination decision is shown to be based on an individualized determination that the terminated employee poses a security risk, judicial review of that underlying determination may raise significant issues in light of this Court's decision in *Department of Navy* v. *Egan*, 484 U.S. 518, 526-530 (1988).

affecting the existence and operations of the "sensitive CIA cover facility" where he was employed in an undercover position; and that petitioner's long-term concealment of activities that he knew would be of security concern to the agency raised concerns that he might not report other sensitive information "if it [did] not suit his personal desires or [might] prove embarrassing for him to do so." C.A. App. 103; see also Pet. App. 20a-21a. As the court of appeals concluded, *id.* at 21a, that sort of documented consideration of legitimate, individualized security concerns was sufficient to support the district court's rejection of petitioner's equal protection claim. See *USIA* v. *Krc*, 989 F.2d 1211, 1214-1216 (D.C. Cir. 1993); compare *Padula* v. *Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (risk of blackmail to protect partners); *High Tech Gays* v. *Defense Industrial Security Clearance Office*, 895 F.2d 563, 578 & n.13 (9th Cir. 1990) ("targeting" of homosexuals by foreign intelligence services); cf. *United States* v. *Lallemand*, 989 F.2d 936, 939-940 (7th Cir. 1993) (married homosexual may be "vulnerable victim" for purposes of sentence enhancement under federal guidelines).

c. Finally, petitioner asserts (Pet. 21) that the decision below conflicts with *Dubbs* v. *CIA*, 866 F.2d 1114, 1119-1120 (9th Cir. 1989). The plaintiff in *Dubbs* alleged in part that the CIA viewed homosexual conduct as a *per se* negative factor in considering security clearances, while treating heterosexual conduct as a negative factor only when it reflected a lack of judgment or discretion or created a potential for exploitation. See *id.* at 1119. The court of appeals did not reach the factual or legal merits of that claim. *Id.* at 1120; see *High Tech Gays*, 895 F.2d at 572 n.8. It held only that a disparate treatment claim could not

be dismissed solely on the ground that *any* individualized consideration of an employee's sexual orientation would automatically satisfy all applicable constitutional requirements, and remanded for further proceedings on the plaintiff's claim.

The ruling in *Dubbs* is inapposite here. The district court in this case did not hold that any evidence of individualized consideration sufficed to defeat petitioner's constitutional claims. Rather, the court was presented with evidence of the Agency's particularized concerns about petitioner, and it held that those concerns were sufficient to justify petitioner's discharge. Pet. App. 31a. The court of appeals carefully reviewed the record and sustained that judgment. *Id.* at 20a-21a, 23a, 26a. The decision below therefore presents no conflict with *Dubbs*, and warrants no further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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